

JAN 24 1989

JOSEPH F. SPANIOLO
CLERKIN THE
Supreme Court of the United States

October Term, 1989

ROBERT COHEN, individually and as a Partner of
SIMON COHEN REAL ESTATE & MANAGEMENT
CO., SIMON COHEN REALTY CO., SIMON COHEN
COMPANY and ALJER REALTY CO. suing on behalf of
himself and all other partners, both general and limited,
and in the right and on behalf of SIMON COHEN
REAL ESTATE & MANAGEMENT CO., SIMON COHEN
REALTY CO., SIMON COHEN COMPANY and ALJER
REALTY CO.,

*Petitioner,**against*

ROBERT J. REED, SIDNEY HACKELL, BEATRICE
POTTER and the FIRST NATIONAL CITY BANK, in-
dividually and as Executors of the Last Will and Testa-
ment of SIMON COHEN, deceased, WILLIAM B.F.
WERNER, individually and doing business as MID-IS-
LAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK,
J.S.K. CLEANING SERVICES, INC., JUDAH FEIN-
ERMAN, JASDANE, INC., SHELDON KATZ, VOLUME
FEEDING, INC., DADGAB, INC., BRIMSCO, INC.,
SIMON COHEN REAL ESTATE & MANAGEMENT
CO., SIMON COHEN REALTY CO. and ALJER
REALTY CO.,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
VOLUME I OF TWO VOLUMES
(Pages A-i to A-xiv—A1 to A233)

MICHAEL E. SCHOEMAN
Attorney of record for Petitioner
SCHOEMAN, MARSH, UPDIKE & WELT
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New York, New York 10165
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APPELLATE DIVISION:
SECOND DEPARTMENT

-----X

ROBERT COHEN, individ- : DECISION
ually and as a partner
of Simon Cohen Real : AD2d
Estate Co., et al.,
: 3666 E
Plaintiffs- : 3666 AE
Appellants, : A-3/24/86
- against - :

ROBERT J. REED, et al.,:

Defendants- :
Respondents.

-----X

Schoeman, Marsh, Updike & Welt, New
York, N.Y. (Michael E. Schoeman and Beth
L. Kaufman of counsel), for appellants.

Speno, Goldberg, Moore, Margules &
Corcoran, Mineola, N.Y. (Debevoise &
Plimpton [Robert W. Corcoran] of
counsel), for respondents Robert Reed,
Sidney Hackell, Citibank, Beatrice
Potter, William B. F. Werner,
Individually and D/B/A Mid-Island
Hospital, Dadgab, Inc., Brimco, Inc.,
Simon Cohen Real Estate Co. and Aljer
Realty Co.

Albert J. Fiorella, Mineola, N.Y.
(Edward F. Hayes III and John P. McEntee
on the brief), for respondents Juan
Soto, Elaine Wilscheck, J.S.K. Cleaning
Services, Inc., Sheldon Katz and Volume
Feeding, Inc.



In an action, inter alia, to recover damages for diversion of partnership assets, the plaintiffs appeal from (1) an order of the Surrogate's Court, Nassau County (Radigan, S.), dated July 23, 1984, which denied their motion for a new trial, (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall resume.

Order and decree affirmed.

One bill of costs is awarded to the respondents Reed, Hackell, Citibank, Potter, Werner, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate Co., Alger Realty Co., Soto, Wilschek, J.S.K. Cleaning Services, Inc., Katz and



Volume Feeding, Inc., appearing separately and filing separate briefs.

The Surrogate is directed to resume the trial on the seventeen the cause of action with all convenient speed.

The instant action was commenced by the decedent Simon Cohen's son individually and as a general and limited partner, on behalf of various partnerships. The complaint essentially alleges that the decedent conspired with the individual defendants to divert assets from the partnerships, perpetrate a fraud on the partners and waste and mismanage partnership assets. In addition, the complaint charges the executors of the decedents' estate with covering up these alleged wrongdoings. The action, originally brought in the Supreme Court, Nassau County, was transferred to the Surrogate's Court,



Nassau County, by order entered December 1, 1971. After a lengthy discovery period, then Surrogate Bennett, in an order dated January 11, 1980, dismissed the first and third causes of action on the ground that they were barred by the Statute of Limitations.

A trial commenced before then Referee Radigan in March of 1980 and continued until October of the following year, at which time, although the plaintiffs had not finished presenting their direct case, it was adjourned without a date for resumption. Prior to the adjournment, the plaintiffs moved, inter alia, for leave to substitute another attorney for the attorney of record. That branch of the plaintiffs' motion which sought the substitution was granted by order dated March 9, 1983.



In the meantime, settlement negotiations were taking place, and, in October of 1982, the plaintiffs submitted a proposed settlement to Surrogate Radigan. The defendants responded by submitting a counter-proposal. At a subsequent conference, the court informed the parties that it intended to send out a notice of settlement offer to the partners, incorporating therein the terms of the counterproposal. The notice was dated January 13, 1983, and provided for responses to be sent to the court.

In its decision dated April 6, 1983, the court analyzed the responses received from the partners, most of which were favorable, and ordered a hearing to give any objectors an opportunity to show cause why the proposed settlement should not be approved. The only partner to appear at



the hearing was the plaintiff Robert Cohen, who opposed the settlement proposal. Three conditions, proposed by various partners in response to the notice of settlement offer, were added to the settlement proposal with the defendants' consent, and the amended proposal was approved by the court in its decision dated April 27, 1984. The plaintiffs then moved for a new trial on the 16 causes of action asserted on behalf of the partnerships, as well as on the seventeenth cause of action, which the plaintiff Robert Cohen asserted individually, on the basis that the inordinate delay in resumption of the trial had prejudiced his due process rights. The court denied that motion by order dated July 23, 1984, holding that the issue was rendered moot by the court's approval of the settlement agreement. A settlement decree



incorporating the proposal was issued on November 27, 1984. The plaintiffs appeal from both the decree and the order denying the motion for a new trial, and we affirm.

This action was brought under partnership Law § 115-a, and thus could not be compromised or settled without the court's approval (Partnership Law § 115-a[4]). The plaintiffs contend that the court exceeded its authority in considering for its approval a proposal which was not actually the result of negotiations between the parties, but was an offer by the defendants. While the "power to approve a settlement does not translate into a power to dictate the terms of settlement (Lee v Gucker, 27 AD2d 722; Smith v Ford Motor Co., 38 AD2d 852)" (Sutherland v City of New York, 107 AD2d 568, 569, affd 66 NY2d 800), where it is apparent that no

meaningful settlement negotiations are being conducted, due in large part to the representative plaintiff's unwillingness to make certain concessions, and the court receives a settlement proposal it considers to be adequate, the court is not without authority to present the offer to the class of people being represented for their approval or disapproval, provided the notice sent to the class is fair and impartial, and does not indicate the court's views on the proposal. If the responses received from the members of that class are sufficiently favorable, the court may then consider the proposal for its approval, and hold a hearing on the fairness, reasonableness and adequacy of the same. In this case, this procedure was followed. Upon receipt of what it evidently considered to be an adequate compromise, the court



transmitted the offer to the partners, i.e., the members of the class being represented by the plaintiffs, for their approval. The court did not consider the offer as an agreement submitted for its approval until after it received favorable responses from a majority of the parties involved. In light of the indications in the record that the plaintiffs had some sort of personal stake in the outcome of the litigation that went beyond the representation of the partnerships, the Surrogate did not err in submitting the defendants' proposal to the partners over the plaintiffs' objection.

A review of the record reveals that the Surrogate was fully aware of the proper standards to be applied in evaluating a settlement, that he applied those standards in approving the settlement, and that he entertained no



improper considerations. As it cannot be said that his decision to approve the settlement was a clear abuse of discretion, that decision will not be overturned on these appeals (see, Officers for Justice v Civil Serv. Commn. of City and County of San Francisco, 688 F2d 615, cert denied sub nom. Byrd v Civil Serv. Commn., 459 US 1217; Cotton v Hinton, 559 F2d 1326; City of Detroit v Grinnell Corp., 495 F2d 448).

Since the Surrogate properly approved the settlement agreement, his denial of the plaintiffs' motion for a new trial on the causes of action which were settled and discontinued by the settlement decree was not improper. However the trial, adjourned sine die in October of 1982, should be resumed with all convenient speed insofar as it relates to the cause of action asserted



by the plaintiff Robert Cohen
individually.

In light of the foregoing we
need not reach the other issues raised
by the plaintiffs, inter alia, with
respect to the reviewability of the
dismissal of the third cause of action.
We have considered the plaintiff's
remaining contentions and find them to
be without merit.

MANGANO, J.P., THOMPSON, NIEHOFF and
RUBIN, JJ., concur.

May 5, 1986



APPELLATE DIVISION:
SECOND DEPARTMENT

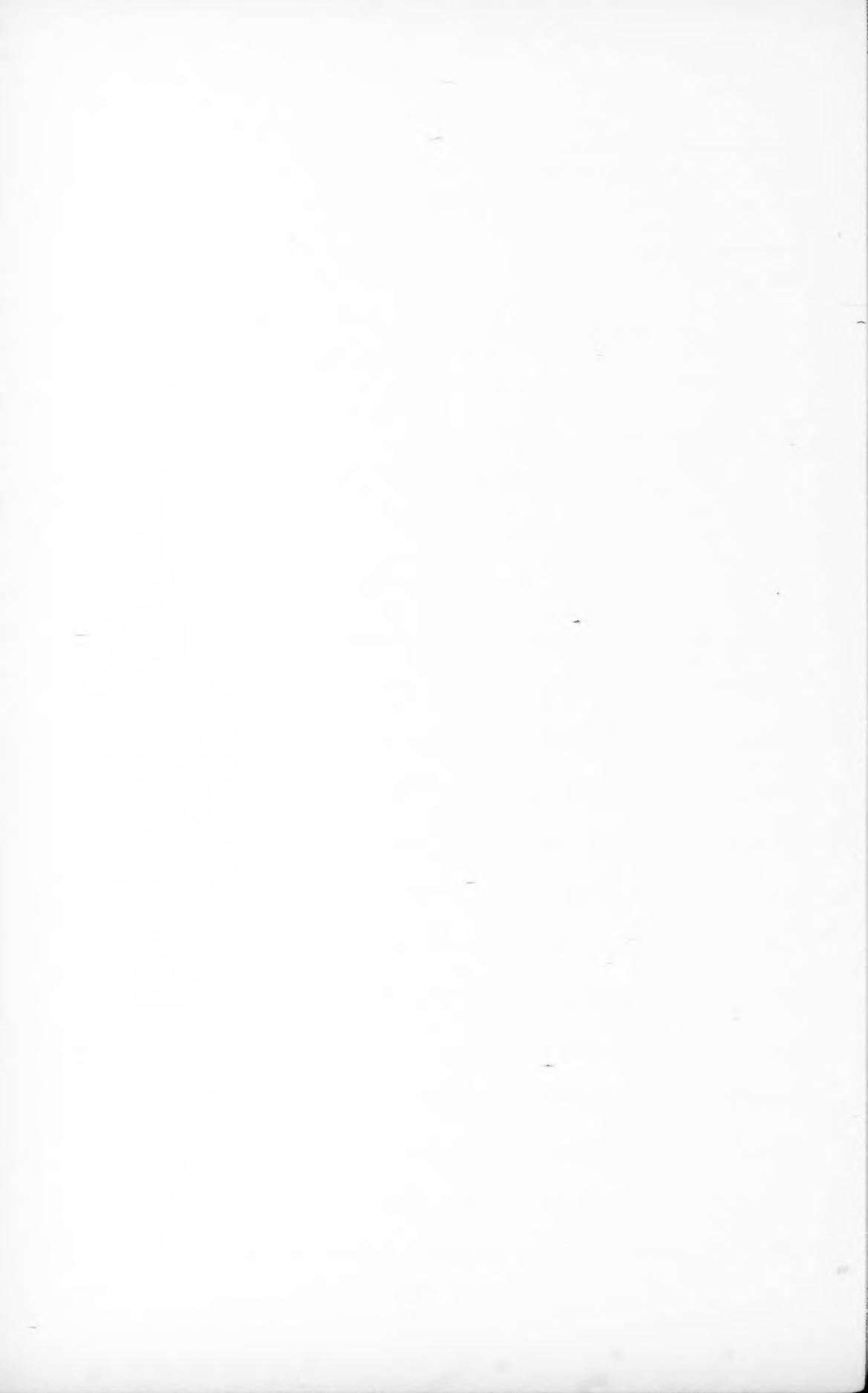
-----X

Robert Cohen, etc., : Index No.
et al., : 148704

:
Appellants, :
v. : ORDER

:
Robert J. Reed, et al., :
Respondents. :
-----X

In the above entitled action,
inter alia, to recover damages for
diversion of partnership assets, the
above named Robert Cohen, etc., et al.,
plaintiffs, having appealed to this
court from (1) an order of the
Surrogate's Court, Nassau County, dated
July 23, 1984, which denied their motion
for a new trial (2) a decree of the same
court, dated November 27, 1984, which
approved a settlement with respect to 16
of the 17 causes of action in the
complaint, and provided that the trial
on the seventeenth cause of action shall



resume; and the said appeals having been argued by Michael E. Schoeman, Esq., of counsel for appellants, argued by Robert W. Corcoran, Esq., and Michael H. Soroka, Esq., of counsel for respondents Robert Reed, Sidney Hackell, Citibank, Beatrice Potter, William B. F. Werner, Individually and D/B/A Mid-Island Hospital, Dadgab, Inc., Brimco, Inc., Simon Cohen Real Estate Co. and Aljer Realty Co., argued by Murray Koven, Esq., of counsel for Judah Feinerman and Jasdane, Inc., and submitted by Albert J. Fiorella, Esq., of counsel for respondents Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc. Sheldon Katz and Volume Feeding, Inc., due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is



ORDERED that the decree
appealed from are hereby unanimously
affirmed, and it is further

ORDERED that one bill of costs
is hereby awarded to the respondents
Reed, Hackell, Citibank, Potter, Werner,
Dadgab, Inc., Brimsco, Inc., Simon Cohen
Real Estate Co., Aljer Realty Co., Soto,
Wilschek, J.S.K. Cleaning Services,
Inc., Katz and Volume Feeding, Inc.,
appearing separately and filing separate
briefs, and it is further

ORDERED that the Surrogate is
hereby directed to resume the trial on
the seventeen cause of action with all
convenient speed.

E N T E R

/s/
Acting Clerk of the
Appellate Division

[ENTERED May 5, 1986.]



SUPREME COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Index No.
ually and as a partner : 15889/71
of SIMON COHEN REAL :
ESTATE & MANAGEMENT :
CO., a limited part- :
nership, etc. :

Plaintiff, : ORDER

- against - :
:

ROBERT J. REED, indi- :
vidually and as Execu- :
tor of the Last Will :
and Testament of SIMON :
COHEN, Deceased, :
et al. :

Defendants. :

-----X

Upon the foregoing papers it
is ordered that this motion be
defendants for an order transferring
this action for all purposes to the
Surrogate's Court, Nassau County, is in
all respects granted. Defendants have
sought the consent of the Surrogate to
such transfer, and in his decision dated
November 24, 1971 the Surrogate

concluded that "in reading the complaint there is no doubt that the allegations therein directly bear on the proper administration of the estate. There are serious allegations concerning possible breach of fiduciary relationship between the executors and this court feels that there is sufficient reason to have all the outstanding claims and disputes determined in one court."

Three of the eleven stated caused of action seek substantial money awards against the estate of Simon Cohen, and the remaining claims are asserted wholly or partially against the Simon Cohen Real Estate & Management Company, the Simon Cohen Realty Company and the Simon Cohen Company. Simon Cohen was the owner of a substantial interest in each of these three enterprises (59%, 40%, and 86%, respectively), and that percentage is



now held by his estate. Accordingly, it is frivolous of plaintiff, Simon Cohen's son, to assert that these remaining causes of action do not directly affect the management of Simon Cohen's estate, an estate already within the jurisdiction of Surrogate Bennett.

For all of these reasons the motion is granted and the action is respectfully transferred for all purposes to the Surrogate's Court. Serve a copy of this order upon the Clerk of the Surrogate's Court, Nassau County.

s/
Hon. Daniel G. Albert

[Entered December 1, 1971.]



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : File No. 148704
ually and as a partner
of SIMON COHEN REAL :
ESTATE & MANAGEMENT
COMPANY, a limited :
partnership, suing on
behalf of himself and
all other partners, :
general and limited, of
the said SIMON COHEN :
REAL ESTATE & MANAGE-
MENT COMPANY, similarly:
situated, and in the
right of the SIMON :
COHEN REAL ESTATE &
MANAGEMENT COMPANY, : DECISION
and as a partner of
SIMON COHEN REALTY :
COMPANY, a limited
partnership, suing on
behalf of himself and :
all other partners,
general and limited, :
of the said SIMON
COHEN REALTY COMPANY, :
and as a partner of
SIMON COHEN COMPANY, :
a limited partnership,
suing on behalf of :
himself and all other
partners, general and :
limited, of SIMON COHEN
COMPANY, similarly :
situated, and in the
right of SIMON COHEN :
COMPANY, :

Plaintiff,



-against- :

ROBERT J. REED, indi- :
vidually and as execu- :
tor of the Last Will :
and Testament of SIMON :
COHEN, deceased, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
as additional executors :
of the Last Will and :
Testament of SIMON :
COHEN, deceased; :
WILLIAM E.F. WERNER, :
individually and doing :
business as MID-ISLAND :
HOSPITAL: SIMON COHEN :
REAL ESTATE & MANAGE- :
MENT COMPANY, SIMON :
COHEN COMPANY, :

Defendants. :

-----X

In the above action,
transferred to this court by the Supreme
Court, it appears that an examination of
the plaintiff has been conducted on
various dates pursuant to a notice of
deposition served by the defendants with
their answer almost a year ago. By
cross notice served by the plaintiff,
one of the defendants is to be examined

and by stipulation of the attorneys, it was agreed that the examination of the defendant Reed was to proceed immediately after completion of the examination of the plaintiff Robert Cohen.

The examination of Robert Cohen accordingly proceeded on July 6, July 20 and September 13, 1972. It appears that the examination was scheduled again for October 6, 1972, cancelled and rescheduled for October 13, 1972, but on the latter date, the witness was late, due, it is said, to a misunderstanding on his part. Instead of rescheduling the examination, counsel for the plaintiff now move for a protective order terminating the plaintiff's deposition and directing that the defendant's deposition proceed.

In opposition, counsel for the defendants deny any fault and in fact



the court is unable to determine from the papers submitted that either counsel or the witnesses were at fault in not continuing the examination on the last date scheduled and neither can the court find, under the circumstances, that the examination had been unduly prolonged. Counsel for the defendants, however, state their belief that the plaintiff's examination will be completed in one more session.

Under the circumstances the motion is denied without prejudice to a renewal of the same if the current deposition does not progress expeditiously. Counsel are directed to communicate with their reporter and arrange a satisfactory time for the adjourned examination and in the event that they cannot agree, the examination is hereby directed to take place in this court on November 30, 1972 at 9:30 a.m.

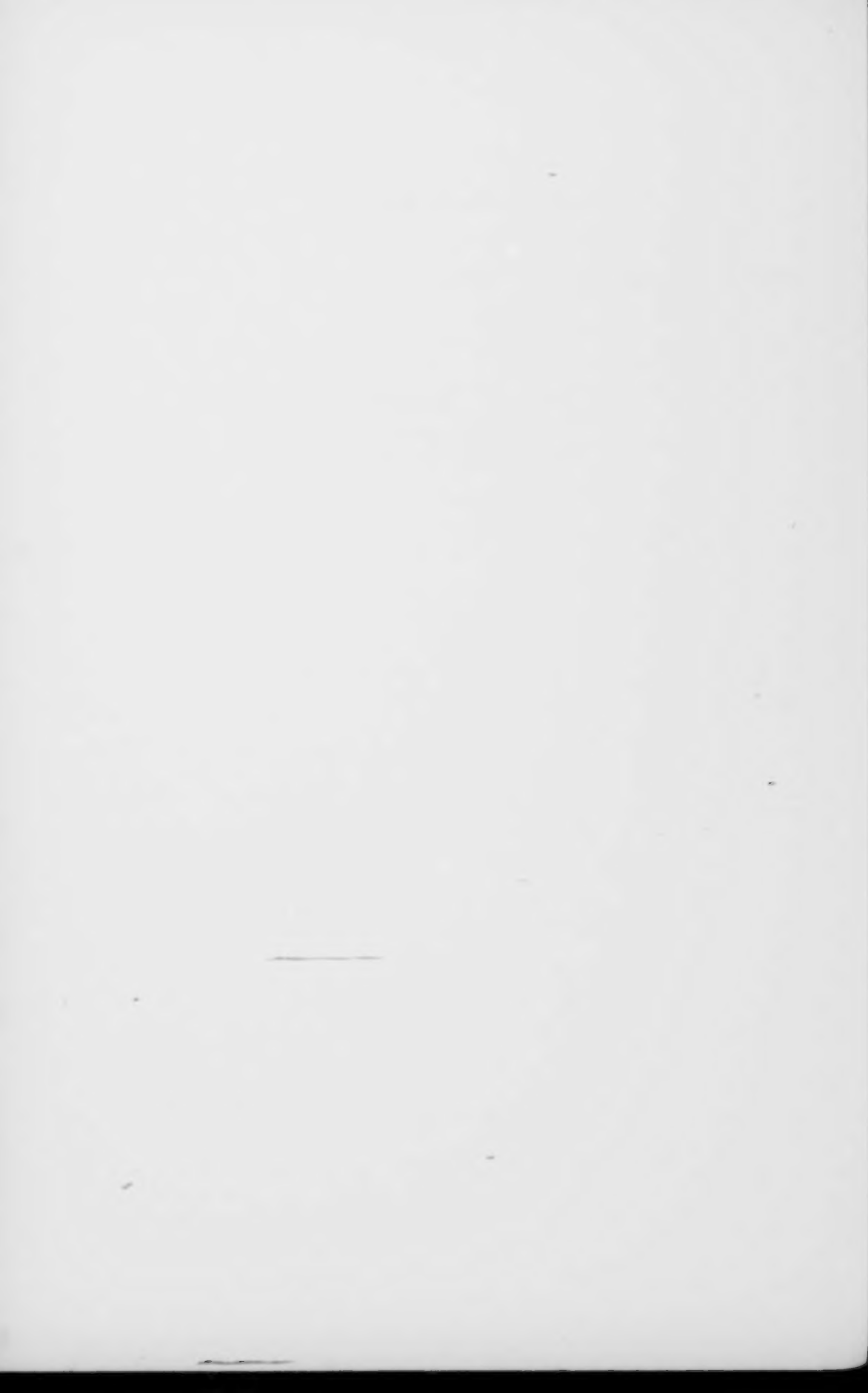


A8

Proceed accordingly.

Dated: November 17, 1972.

JOHN D. BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : File No.
ually and as a partner : 148704
of SIMON COHEN REAL :
ESTATE & MANAGEMENT :
CO., a limited part- :
nership, etc. :

: DECISION
Plaintiffs,

- against -

ROBERT J. REED, indi- :
vidually and as Execu- :
tor of the Last Will :
and Testament of SIMON :
COHEN, Deceased, :
et al. :

Defendants.

-----X

The motion to stay the
examinations before trial which are
presently being conducted is denied.

The fact that the executors
intend to file an accounting is no
justification for delaying the progress
of this proceeding. The additional
contention that the plaintiff may later
amend the complaint and thereby require



further examination before trial is equally without force since the court will not allow any additional examinations at that time if it is shown that it would be to the detriment of any of the parties.

Proceed accordingly.

Dated: July 24, 1973

s/
JOHN D BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

In the Matter of the : ORDER
Application of ROBERT
COHEN for a decree re- : File No.
moving the Trustees of : 148704/1971
the Robert Cohen Trust :
established under the
Last Will and Testament:
of Simon Cohen,
late of the County of :
Nassau, deceased.

-----X

Upon reading and filing the
petition of ROBERT COHEN duly verified
the 13th day of November, 1973, praying
for a decree pursuant to S.C.P.A. §711
revoking the Letters of Trusteeship of
the trust created under the second
codicil of the Last Will and Testament
of Simon Cohen, decedent above named,
issued to BEATRICE POTTER, SIDNEY
HACKELL, ROBERT J. REED and THE FIRST
NATIONAL CITY BANK, and removing and
replacing said trustees on the ground
that they have breached and violated



their trust by acting out of hostility and spite to injure the life beneficiary without due regard for their duty to administer the trust in the interests of the beneficiary, and that the Surrogate's Court having entertained the proceeding,

NOW, on motion of STEINHAUS AND HOCHHAUSER, attorneys for the said petitioner, it is -

ORDERED, that a citation be issued directed to BEATRICE POTTER, SIDNEY HACKELL, ROBERT J. REED and THE FIRST NATIONAL CITY BANK as such trustees citing them to show cause why a decree should not be made accordingly.

ORDERED, that pending the hearing and determination of this petition that BEATRICE POTTER, SIDNEY HACKELL, ROBERT J. REED and THE FIRST

NATIONAL CITY BANK be and the same hereby are enjoined from, and their powers are suspended to the extent of prohibiting them from, consummating a sale of the corpus of the Trust, namely, the property located at 1378 Main Avenue, Clifton, New Jersey, to Monmouth Real Estate Investment Trust or to any other entity.

/s/
JOHN D. BENNETT
Judge of the
Surrogate's Court

[ENTERED November 20, 1973.]



SURROGATE'S COURT:
NASSAU COUNTY

-----X

In the Matter of the : DECISION
Application of ROBERT
COHEN for a decree re- : File No. 148704

moving the Trustees of
the Robert Cohen Trust :
established under the
Last Will and Testament:
of SIMON COHEN,
late of the County of :
Nassau, deceased.

-----X

In this proceeding to revoke
the letters of the trustees the
respondents have made a motion to
dismiss the petition.

SCPA 711 sets out specific
grounds under which fiduciaries may be
removed. The thrust of the petitioner's
argument is that the trustees have sold
a parcel of real property motivated by
malice and hostility. This matter of
the sale of the real property was the



subject of a prolonged hearing before this court wherein all parties were heard and presented opposing views. On October 30, 1973 the court rendered its decision denying the petitioner's petition for advice and consent but expressly refusing to disapprove the sale, finding that the question was not one of law but of business judgment on the part of the trustees.

The court finds that the petitioner's allegations do not fall within the purview of SCPA 711 (Matter of Puglisi, 205 Misc. 773, affd. 285 A D 890). Accordingly, the court grants respondent's motion to dismiss the petition to revoke letters.

Settle decree on five days' notice with three additional days if



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service is made by mail.

Dated: February 6, 1974.

JOHN D. BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

In the Matter of the : D E C R E E
Application of ROBERT
COHEN for a decree re- : File #148704
moving the Trustees of
the Robert Cohen Trust :
established under the
Last Will and Testament:
of SIMON COHEN,
late of the County of :
Nassau, deceased.

-----X

Upon reading and filing the
Order to Show Cause herein dated
November 20, 1973, the petition of
ROBERT COHEN herein, verified the 13th
day of November, 1973, the answer
herein, dated the 11th day of December,
1973, and all of the papers attached
thereto, upon the Notice of Motion of
the respondent Trustees to dismiss this
proceeding, which motion was dated
December 26, 1973, upon the affidavit of



ROBERT J. REED, sworn to the 2nd day of January, 1974, submitted in support of the Trustees' aforesaid motion to dismiss; and upon all of the pleadings and proceedings heretofore had herein; and the Petitioner having appeared by STEINHAUS & HOCKHAUSER, ESQS., and the Respondents having appeared by SPENO, GOLDBERG, MOORE, MARGULES & CORCORAN, ESQS.; and the Court having received written memoranda of the respective parties hereto; and the Court having rendered a decision herein in writing on the 6th day of February, 1974, it is

ORDERED, ADJUDGED AND DECREED,
that the motion of the Respondent



A19

Trustees to dismiss the petition herein
is granted.

/s/
JOHN D. BENNETT
Judge of the
Surrogate's Court

[ENTERED February 28, 1974.]

SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, et al.,
Plaintiff, : ORDER OF
: REFERENCE
:
- against - : File No. 148704

ROBERT J. REED, et al.,:

Defendants :

-----X

It appearing from the petition
and papers submitted in opposition
thereto that issues of fact have been
raised in the above entitled proceeding,
it is

ORDERED that said matter be
referred to

C. RAYMOND RADIGAN,
as Referee, to hear the proofs of the
parties on all questions and issues
arising therein and make a report



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thereon to the court with all convenient speed.

/s/ John D. Bennett
Judge of the
Surrogate's Court

[ENTERED May 16, 1979.]



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

DECISION

ROBERT COHEN, Individ- : File No. 148704
ually and as a Partner : No. 42
of Simon Cohen Real :
Estate & Management
Co., Simon Cohen Realty:
Co., suing on behalf of
himself and all other :
partners, both general
and limited, and in the:
right and on behalf of
Simon Cohen Real Estate:
& Management Co., Simon
Cohen Realty Co., Simon:
Cohen Company, and
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE
POTTER, and THE FIRST :
NATIONAL CITY BANK,
Individually and as :
Executors of the Last
Will and Testament of :
Simon Cohen, deceased,
WILLIAM B. F. WERNER, :
Individually and doing
business as Mid Island :
Hospital, JUAN SOTO,
ELAINE WILSCHEK, J.S.K.:
CLEANING SERVICES,
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC.,
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO., and
ALJER CO., :

Defendants. :

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A decision having been
rendered on March 27, 1979 determining
that a motion for summary judgment and a
motion to dismiss would be considered in
the above captioned proceeding, the
attorneys for all parties are hereby
advised that all additional memoranda in
connection with said motions are to be
submitted on or before July 23, 1979.

Proceed accordingly.

Dated: July 12, 1979.

JOHN D. BENNETT
Judge of the
Surrogate's Court

/s/ 7/23/79 - So Ordered



SURROGATE'S COURT:
COUNTY OF NASSAU

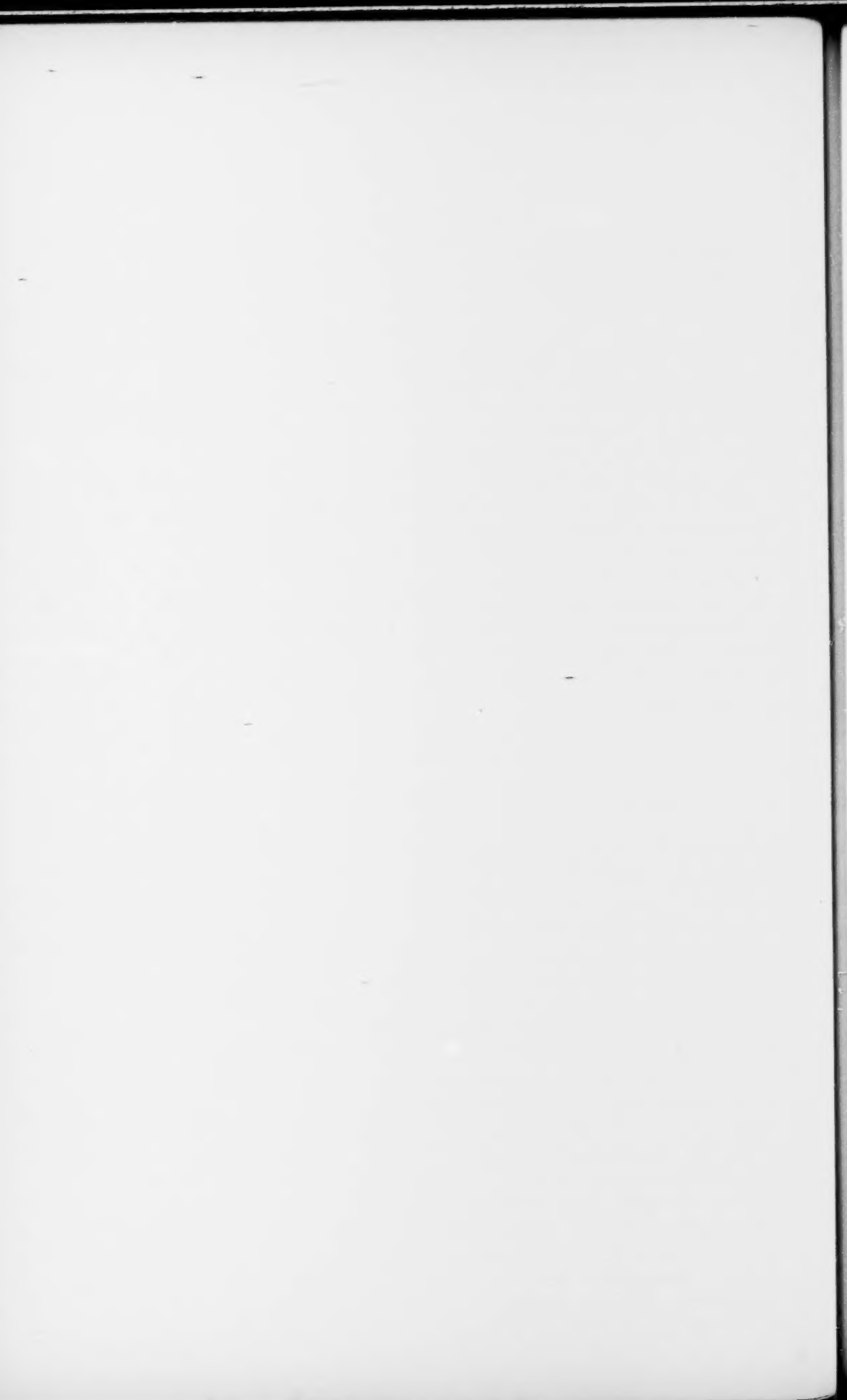
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of Simon Cohen Real :
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Co., suing on behalf of :
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and limited, and in the:
right and on behalf of :
Simon Cohen Real Estate: REPORT OF
& Management Co., Simon REFEREE
Cohen Realty Co., Simon:
Cohen Company, and
Aljer Realty Co., :

Plaintiff, :

-against- :

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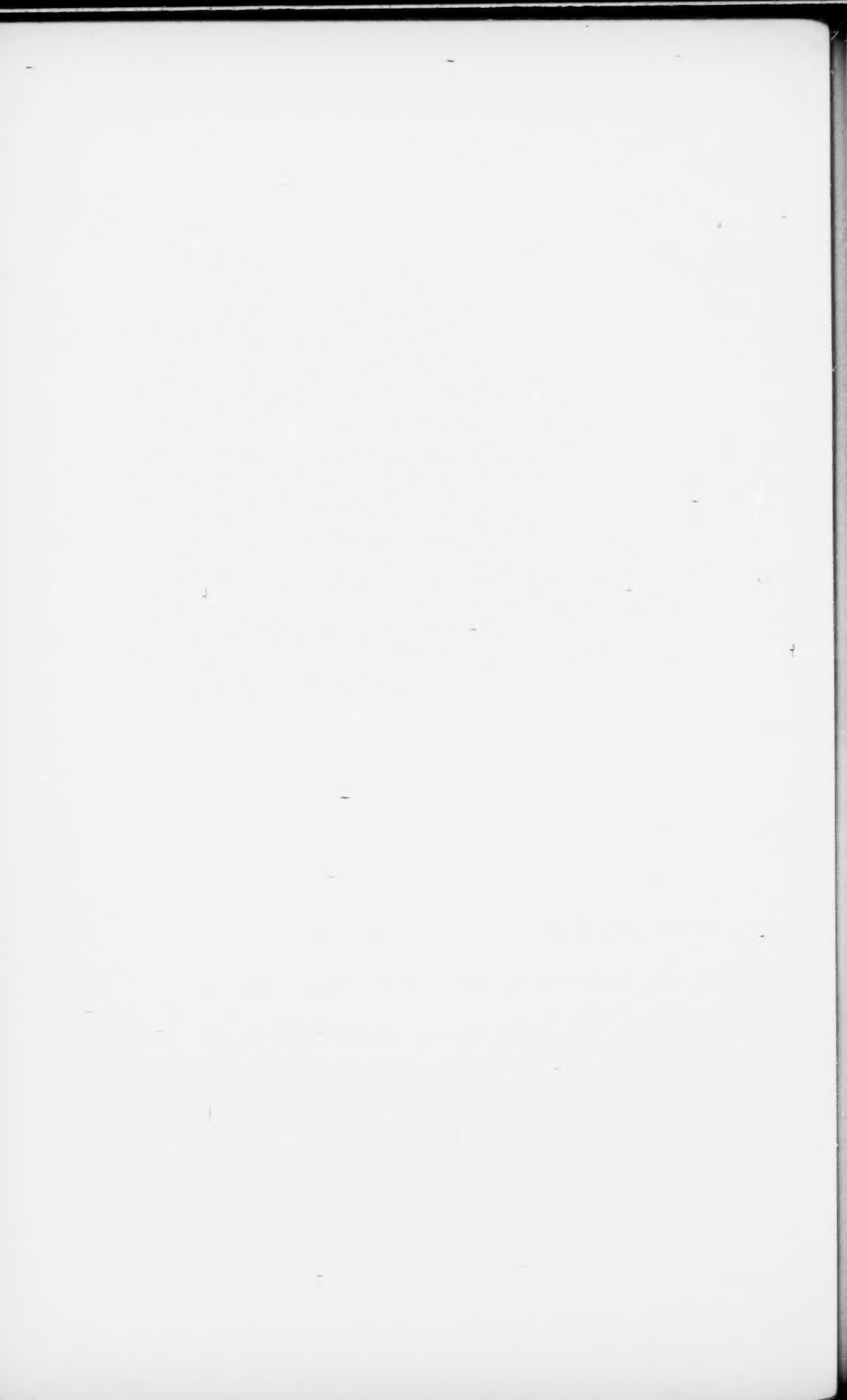
COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO., and
ALJER CO., :

Defendants. :

-----X

TO THE SURROGATE'S COURT OF THE COUNTY
OF NASSAU:

This is an action by Robert Cohen, son of the decedent Simon Cohen, individually and on behalf of the partners of various partnerships, against the executors of his father's estate individually for conspiracy to defraud and in their fiduciary capacities for fraud alleged to have been committed by the decedent and for breach of fiduciary duty to creditors of the estate. In addition, it is alleged that the decedent and one of the executors of his estate, Robert Reed, breached their fiduciary duty to the Simon Cohen Real Estate and Management Company (hereinafter SCREAM) by



mismanagement and waste and by siphoning funds due and owing from the Mid-Island Hospital (hereinafter M-I-H) to SCREAM through "satellite" businesses and individuals who are defendants in this proceeding. M-I-H and its owner and operator William Werner are also defendants.

Additionally, the complaint alleges fraud and breach of trust by Simon Cohen and Robert Reed individually in connection with other partnerships and seeks accountings from Reed and the executors of the estate of Simon Cohen. It is also alleged that Simon Cohen clandestinely borrowed money from the partnerships without payment of interest.

The plaintiff seeks reformation of a sublease between SCREAM and M-I-H to permit SCREAM to inspect and audit the hospital's books and



records and a declaratory judgment granting virtually the same relief.

The defendants had previously moved for an order dismissing each cause of action and for an order granting summary judgment. The court reserved decision pursuant to subdivision (d) of CPLR 3211 to allow the parties to exhaust all discovery and disclosure devices which has now been completed. Reargument of the previous motion for summary judgment was made before me as referee pursuant to an order of this court made on May 16, 1979 and I respectfully report as follows:

Turning first to the motion to dismiss the fourth, fifth, sixth, eighth, ninth and tenth causes of action, the defendants contend that the plaintiff is barred by the statute of limitations on the ground that he knew



or had reason to know of the allegedly fraudulent acts prior to 1971 when this suit was commenced.

The defendants' argument is based in part on a misinterpretation of subdivision (8) of CPLR 213 which requires that an action based on fraud be commenced within six years and provides that the "time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud or could with reasonable diligence have discovered it".

This clause, which requires that the computation of time be made from the date of discovery or imputed discovery has the effect of extending the six year period rather than limiting it. The six year period is tolled until such time as discovery is made or could



reasonably have been made. The statute of limitations is the later of six years from the date of the commission of the fraud or two years from the time the plaintiff discovered the fraud or could have discovered it (CPLR 203 subd [f]: McCabe v Gelfand (57 Misc 2d 12, vacated on other grounds, 58 Misc 2d 497)).

Subdivision (8) of CPLR 213 applies only to those causes of action which are predicated on actual fraud rather than constructive fraud. A cause of action based on constructive fraud is controlled by subdivision (1) of CPLR 213, the six year statute of limitations governing equitable actions in general (Curry v Chollette, 57 AD 2d 604, affd 43 NY 2d 984) whereas subdivision (8) of CPLR 213 applies to actions predicated on actual fraud.

Where it is alleged that there is a breach of fiduciary duty the test



to be applied to determine if the cause of action is based on constructive or actual fraud is whether it is alleged that there was a design to mislead the plaintiff by misrepresentations of fact or concealment of facts (Quadrozzi Concrete Corp v Mastroianni, 56 AD 2d 353).

Where such a plan is alleged, the cause of action is predicated on actual fraud and subdivision (8) of CPLR 213 applies (Erbe v Lincoln Rochester Trust Co, 3 NY 2d 321).

In the present case, the plaintiff alleges that Simon Cohen and Robert Reed participated in a conspiracy to divert funds from the Simon Cohen Realty Company (hereinafter SCR) and to transfer funds belonging to SCREAM to other businesses and individuals. To this extent the complaint alleges actual fraud. In addition, there are allegations of actual fraud against



Werner/M-I-H, First National City Bank (hereinafter Citibank), Robert Reed, Beatrice Potter, and Sidney Hackell in their individual and fiduciary capacities as well as other defendants listed in the tenth cause of action.

It is apparent that the six-year statute of limitations without the benefit of the accrual provision does not constitute a bar to the eighth and ninth causes of action, the material elements of which were contained in the original complaint filed in 1971. An amended and supplemental complaint was filed in August 1974. Both complaints seek relief for misconduct alleged to have occurred in 1968 and subsequent hereto.

As to the fourth cause of action which seeks an accounting from Simon Cohen's executors and Reed individually with respect to the

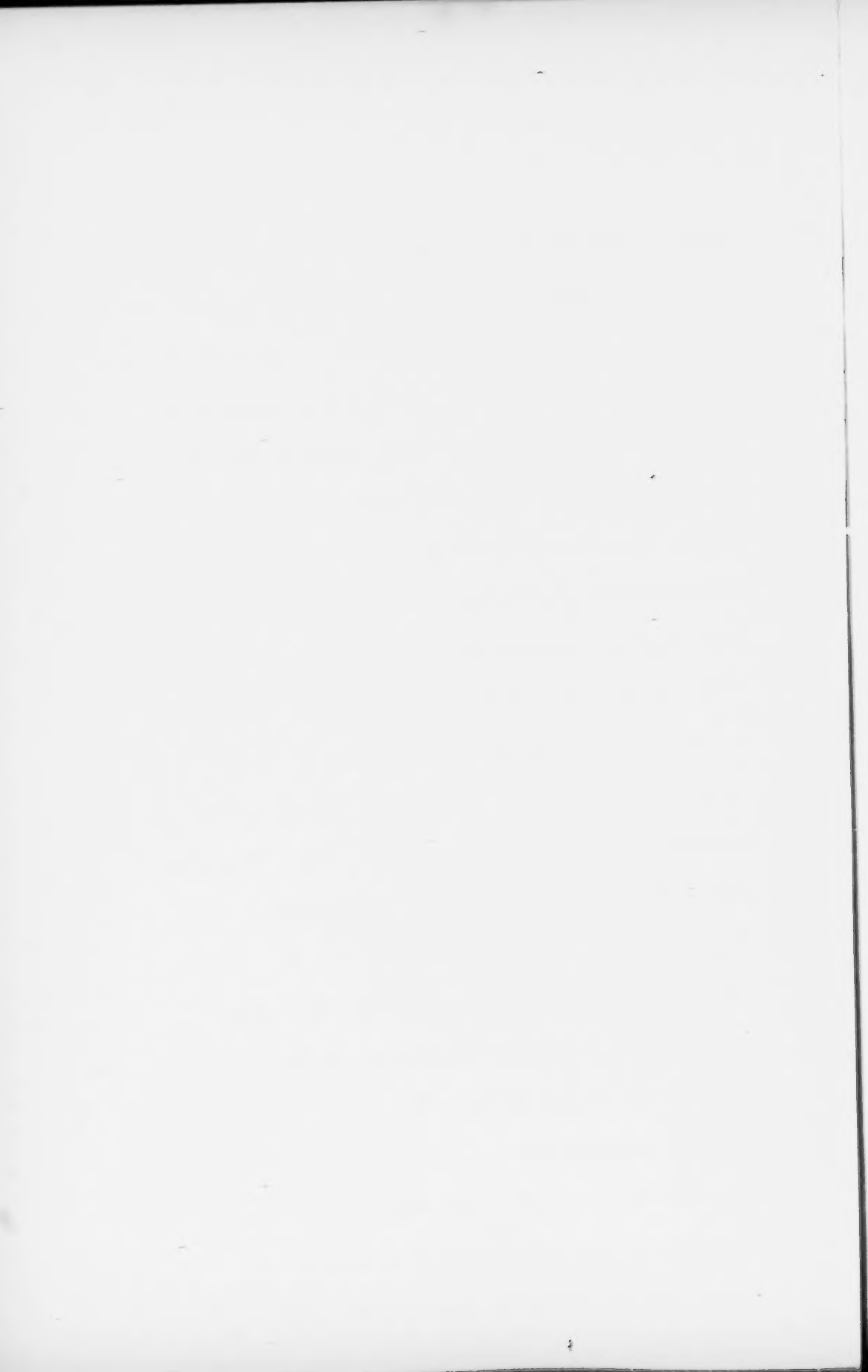


operation of SCR, the elements of this cause of action were present in the original complaint.

The fifth and sixth causes of action seek damages from Werner/M-I-H and Potter, Citibank, Hackell and Reed individually. However, there were no allegations against Citibank, Hackell and Potter individually with respect to SCR in the original complaint.

Allegations against Werner/M-I-H and Reed individually in connection with the alleged diversion of funds from SCR were present in the original complaint.

A claim asserted in a complaint is interposed against the defendant when the summons is served (CPLR 203 subd [b]). An action is deemed commenced as of the date of service of an amended complaint when the complaint is amended as a matter of grace so as to set out a new cause of



action based on an obligation or liability different from that originally pleaded (*Guntzer v County of Westchester*, 273 App Div 966, affd 298 NY 755).

In the present case, the allegations against Potter, Hackell and Citibank individually concerning SCR first appeared in the amended and supplemental complaint filed in August 1974. The statute of limitations would therefore be six years before August 1974 or two years from discovery or imputed discovery of the fraud, whichever is longer.

Where a plaintiff can reasonably be expected to be aware of the facts which may constitute fraud, discovery will be imputed to him. Imputed knowledge is a mixed question of law and fact and it is only where it conclusively appears that the plaintiff



had knowledge of the facts that the complaint should be dismissed on motion (Trepuk v Frank, 44 NY 2d 723; Azoy v Fowler, 57 AD 2d 541).

However, in particularly clear cases, summary judgment can be granted especially where the plaintiff's own version of the facts as set forth in his affidavit demonstrates without any doubt that he could have discovered the fraud within the statutory period had he used reasonable diligence (Rickel v Levy, 370 F Supp 751; cf. Friedlander v Feinberg, 369 F Supp 917, affd w/o opn 508 P 2d 836).

It is the plaintiff's individual knowledge which determines whether the action is time barred (Rickel v Levy, supra; Friedlander v Feinberg, supra; but see Mencher v Richards, 256 App Div 280).



In the present case, the plaintiff states in an affidavit in opposition to the defendants' motion for summary judgment that "the interim financial statement of SCR which Mr. Hackell sent to me in mid-December 1970 indicated substantial loans from SCR to the hospital and from SCR to my father * * * ."

Based on the affidavits submitted by the plaintiff as well as the defendants, it is clear that the plaintiff was either aware in 1970 of the allegedly fraudulent acts complained of or could with reasonable diligence have discovered the facts at or about that time or at least before 1973 and accordingly he will not be afforded the benefit of the accrual provision.

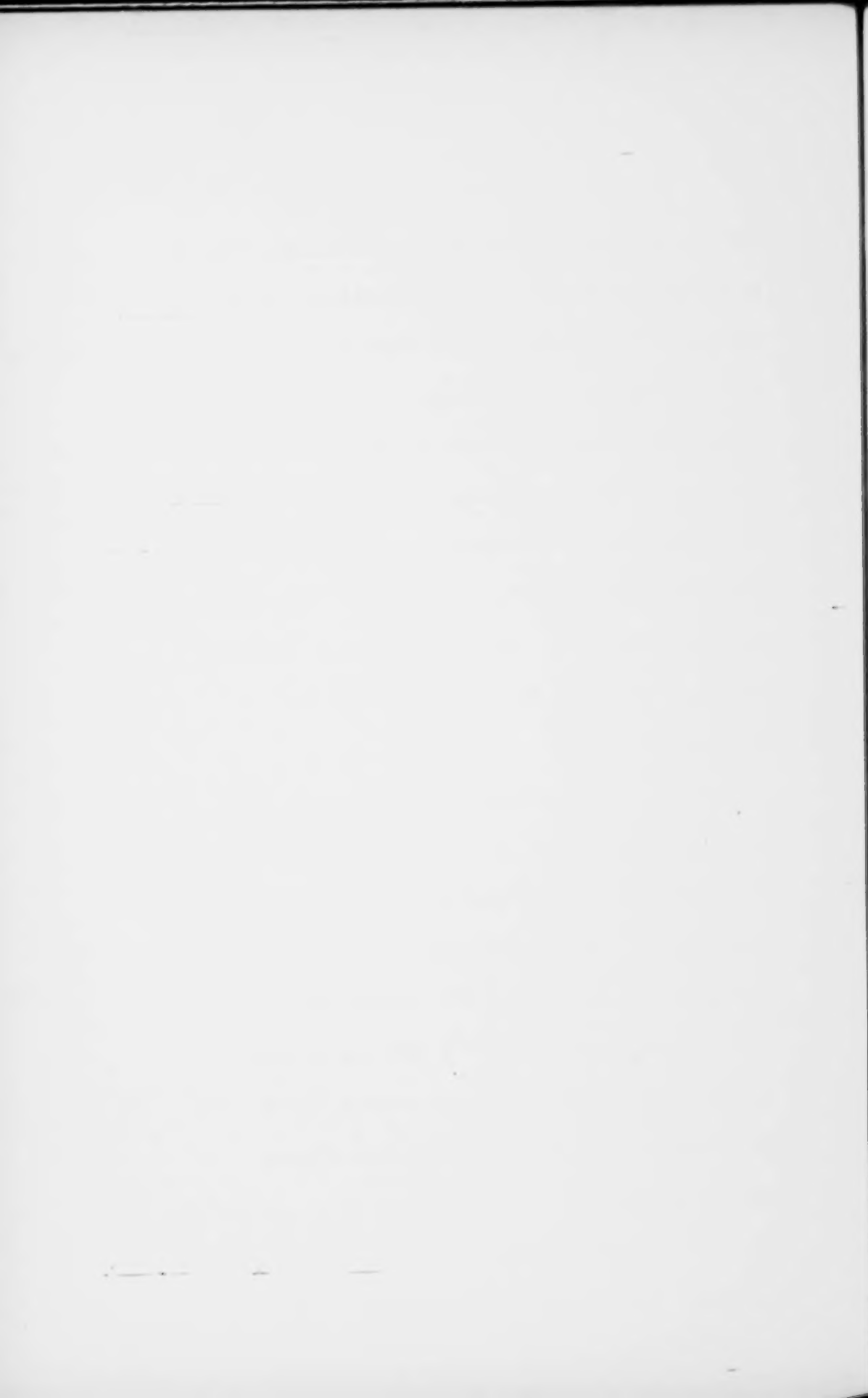
(McCabe v Gelfand, supra). The six-year statute of limitations, when applied without the two-year provision to the



fifth and sixth causes of action, would presumably bar all allegations of fraud against the defendants Hackell, Potter and Citibank individually for an acts of fraud alleged to have occurred prior to August 1968. However, since an issue of fact exists as to precisely when each of the acts complained of may have occurred neither the motion for summary judgment nor the motion to dismiss can be granted.

With respect to Robert Reed individually and as executor, the statute of limitations does not bar the fourth, fifth and sixth causes of action since the substance of these causes of action were present in the original complaint, and Reed was named as a defendant in connection with those allegations.

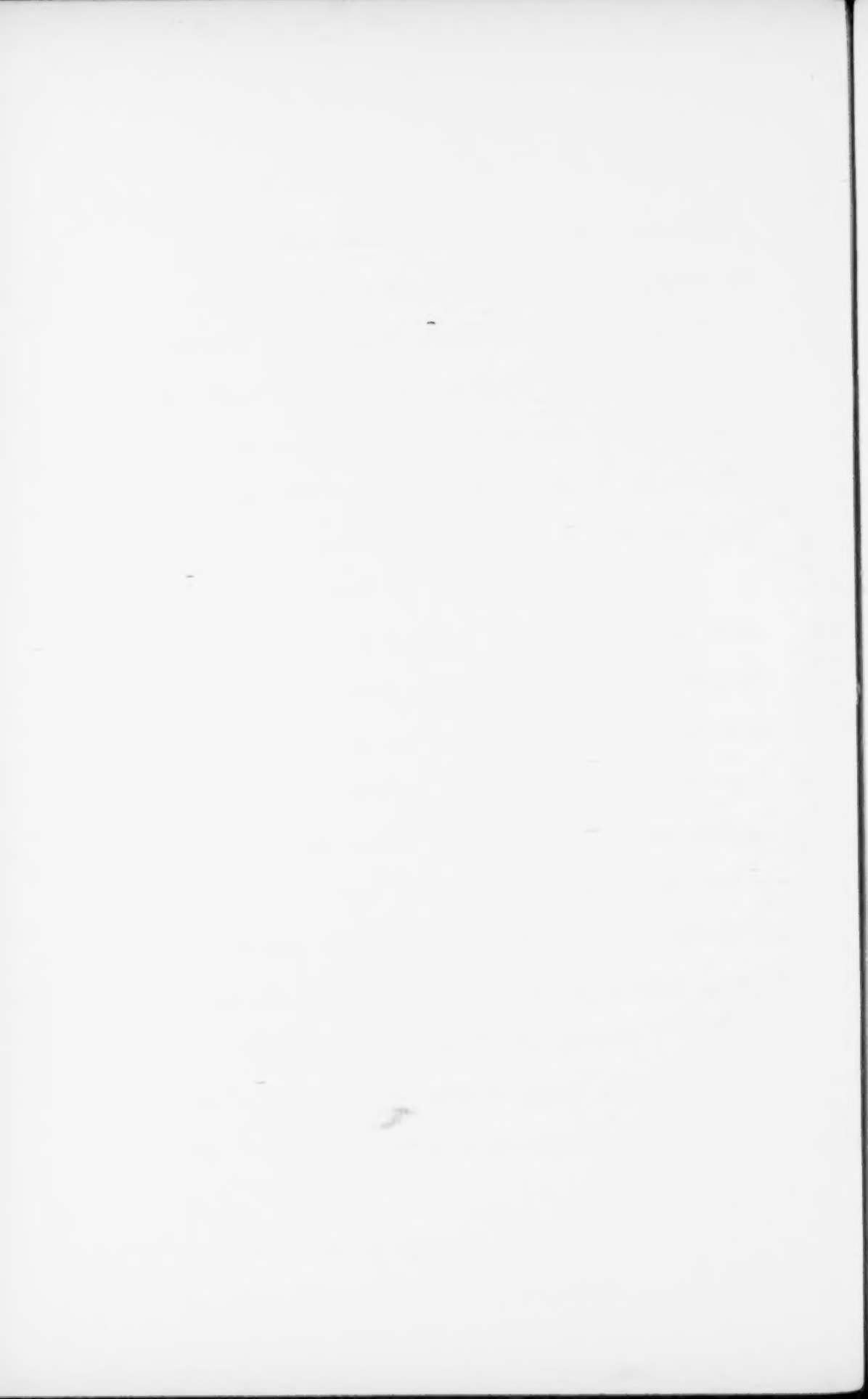
As to the tenth cause of action, although the amended and



supplemental complaint added certain defendants to the allegations of fraud with respect to SCREAM, the question as to whether the accrual provision applies and whether the six year limitation in itself is a bar, cannot be resolved at this stage in the proceedings.

Turning next to the motion to dismiss the first, second and third causes of action on the ground that they are barred by the statute of limitations, the first cause of action seeks reformation of a sublease between M-I-H and SCREAM based on mutual mistake. A cause of action to reform a lease based on mutual mistake with no claim of fraud, accrues upon execution and delivery regardless of when it was discovered (*Nichols v Regant Properties*, 49 AD 2d 847).

The first cause of action accrued on February 1, 1968, the date of

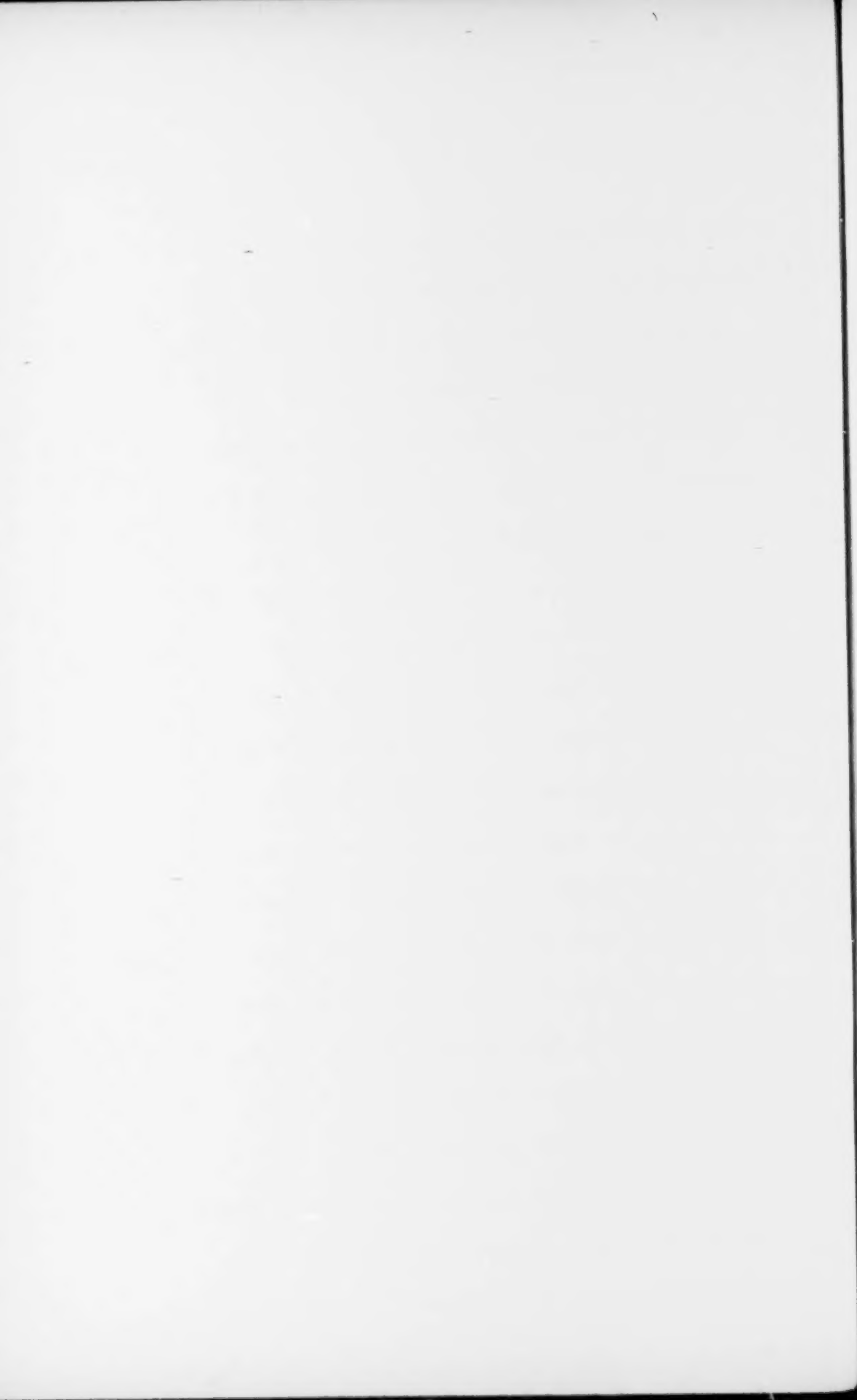


the execution of the contract. It is barred by subdivision (6) of CPLR 213, the six year statute of limitations for actions based on mistake.

The second cause of action seeks reformation of the sublease based on fraud and mistake.

Where mistake and fraud are alleged, subdivision (8) of CPLR 213 may apply (*Metropolitan Life Insurance Co v Oseas*, 261 App Div 768, affd w/o opn, 289 NY 731) and the plaintiff may be entitled to the benefit of the accrual provision depending upon the nature of the fraud and the effect it had on the plaintiff's ability to discover the mistake (c.f. *Goodbody & Co v Stern*, 93 Misc 2d 109).

In the present case, a determination as to whether the alleged fraud of Simon Cohen or others contributed to a mistake thereby making



subdivision (8) applicable should not, under the circumstances, be made on motion. Likewise, the determination as to whether the accrual provision will then apply cannot be made on the affidavits submitted.

The third cause of action is for a declaratory judgment permitting an inspection and audit of the books and records of M-I-H.

There is no statute of limitations specifically applicable to an action for a declaratory judgment. The statute of limitations employed in a particular case is that which would have been applied had coercive relief been sought (3 Weinstein-Korn-Miller, NY Civ Prac ¶3001.19). A plaintiff should not be permitted to circumvent the statute of limitations by categorizing an action as one for a declaratory judgment (Keith



v New York State Teacher's Retirement System, 46 AD 2d 938).

In the present case, the relief sought is for a declaratory judgment permitting the plaintiff to inspect and audit the hospital's books. The coercive relief sought would be a judgment directing an audit (see *Victrosen v Kaplan*, 75 Misc 2d, affd 44 AD 2d 702). Such an action would be equitable in nature and the six year statute of limitations would normally apply.

An action based on actual fraud, however, is governed by subdivision (8) of CPLR 213 regardless of whether the remedy is at law or equity (*Quadrozzi Concrete Corp v Mastroianni*, supra). Therefore, if it is determined that the underlying cause of action for an audit is based on actual fraud, subdivision (8) would

apply even though an equitable remedy is sought.

Although the third cause of action incorporates allegations of misconduct and conflict of interest, the theory upon which the cause of action rests is an implied condition in the sublease, as stated in the complaint and the plaintiff's memorandum of law.

The third cause of action is in substance an action based on a breach of an implied condition (see *Stern v Dunlap*, 228 F 2d 939), not fraud. The six year statute of limitations therefore applies (CPLR 213 subd [1]).

The first and third causes of action are therefore barred by the statute of limitations. The second cause of action may be barred by the six year statute but the plaintiff must be afforded an opportunity to establish



that the facts require an application of the accrual provision.

Turning next to the question of status, the defendants contend that Robert Cohen lacks standing to bring a derivative suit as a limited partner in SCR and SCREAM pursuant to section 115-a of the Partnership Law.

Section 115-a provides that an action may be brought in the right of a limited partner to procure a judgment in its favor if "in any such action, it shall be made to appear that at least one plaintiff is such a limited partner, * * * at the time of bringing the action, and that he was such at the time of the transaction of which he complains * * *".

The defendants maintain that Robert Cohen cannot assert that he is a general partner and at the same time attempt to sue derivatively as a limited



partner in SCREAM. The defendants correctly observe that the complaint states that "at all relevant times herein, plaintiff Robert Cohen was and still is a general partner in SCREAM" and that this allegation is reiterated throughout the complaint even in those causes of action which are brought pursuant to section 115-a.

In a motion for summary judgment as well as a motion to dismiss a complaint, the moving party must submit proof in support of his claim. In the present case, the defendants seek to dismiss on the ground of incapacity because Robert Cohen alleges that he is a general partner. They do not seek to dismiss on the ground that Robert Cohen is not in fact a general partner. Indeed, the defendants, in their answer, deny that the plaintiff is a general partner.

The defendants cannot purport to concede that Robert Cohen is a general partner "for the purpose of this motion" without conceding the point for all purposes.

In substance the defendants' motion to dismiss is based on a claim that there is a failure to state a cause of action.

On a motion to dismiss, when evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that a significant dispute exists regarding it, dismissal should not eventuate (*Guggenheimer v Ginzburg*, 43 NY 2d 268).

Where a pleading is attacked for alleged inadequacy in its statements, the court's inquiry should be limited to whether it states in some recognizable form any cause of action known to our law (*Foley v D'Agostino*, 21 AD 2d 60). A pleading is deemed to allege whatever can be implied from its statements (*Town of Ogden v Howarth & Sons*, 58 Misc 2d 213).

In the present case, a reasonable interpretation of the complaint is that Robert Cohen alleges that he is a general partner and in the alternative that he is a limited partner. If his status as a general partner is not sustained he seeks to bring an action on behalf of the partnership as a limited partner.

If it is determined that Robert Cohen was a limited partner in SCREAM at the time of the allegedly



fraudulent acts which are the subject of this proceeding, he has standing to institute a derivative action and a class action on behalf of the limited partners provided that the requirements of §115-a are met.

A derivative suit is in effect an action against the general partners for wrongfully refusing to sue as well as the third party who is allegedly liable to the partnership. Limited partners are authorized to sue on behalf of the partnership entity to enforce a partnership claim when those in control of the business wrongfully refuse to do so (*Riviera Congress Assn v Yassky*, 18 NY 2d 540).

Where it is alleged that the general partners will not institute an action because of their own self-dealings, the limited partners should be



permitted to bring an action (Riviera Congress Assn v Yassky, supra).

Therefore, the motion to dismiss the seventh, eighth, ninth, tenth and eleventh causes of action on the grounds that the plaintiff lacks standing as a limited partner should be denied.

With respect to SCR alone, the defendants contend that the plaintiff did not have standing in 1971 to bring a derivative suit as a limited partner since the partnership was dissolved on November 15, 1970. The basis of this contention is the provision in section 115-a which requires that the plaintiff be a limited partner at the time of the suit (Partnership Law, §115-a subd [b]).

The plaintiff in his original complaint states that the partnership was dissolved as of the dates of Simon Cohen's death and was never

reconstituted. This was not alleged in the amended complaint.

On dissolution, the partnership is not terminated but continues until the winding up of the partnership affairs is completed (Partnership Law, §61). The only manner in which a partnership can be wound up is through an accounting (Ben-Dashan v Plitt, 58 AD 2d 244). The remaining partners of a dissolved partnership are still carrying on the business as partners. They can be sued in the partnership name (Matter of Luckenbach, 45 Misc 2d 897) and may enforce a partnership claim. Indeed, the defendant Werner previously brought an article 78 proceeding in the Supreme Court, Nassau County, against the Commissioner of Social Services and on behalf of M-I-H. The limited partnership which had been formed to



operate the hospital was no longer in existence at the time of the lawsuit. Nevertheless, the court held that the petitioner, as a liquidating partner, had standing to bring an action (Matter of Mid-Island Hospital v Wyman, 27 AD 2d 866).

Even if the court were to determine as a matter of law that the partnership was dissolved as of November 1970, any rights which the plaintiff may have to bring a derivative suit did not terminate solely because of the death of Simon Cohen.

This would apply to a class action against a partner on behalf of the limited partners as well. The dissolution of the partnership does not discharge the existing liability of a partner (Partnership Law, §67).

The motion to dismiss the fourth, fifth, sixth and twelfth causes

of action on the grounds that the plaintiff has no standing as a limited partner of SCR should therefore be denied.

The defendants contend that to the extent the first, second, third, fourth, fifth, sixth, seventh, ninth and tenth causes of action against Hackell, Potter, Citibank and Weiner/M-I-H are brought pursuant to §115-a of the Partnership Law, the plaintiff is barred as to any transactions occurring before August 6, 1971, three years prior to the amended complaint. This contention is based on an application of CPLR 214.

CLPR 214 provides that an action to recover upon a liability, penalty or forfeiture created by statute (except as provided in sections 213 and 215) must be commenced within three years (CPLR 214 subd [2]).

In the present case, the statute in question does not provide for any new claims. It merely provides standing to the limited partners to enforce a claim.

The purpose of §115-a was to codify the rule already established by decisional law that a limited partner may bring a derivative action in the right of a limited partnership to procure a judgment in its favor (Note, L 1968, ch 496).

Where a statute does not create a new claim but merely provides standing CPLR 214 does not apply (State of N.Y. v Cortelle Corp, 38 NY 2d 83).

CPLR 214 has no application whatsoever to the fifth, sixth, seventh, ninth and tenth causes of action.

Additional questions are raised in connection with Robert Cohen's standing to sue the defendants Simon

Cohen and the executors of the estate of Simon Cohen in a class action for breach of trust, individually or on behalf of the limited partners of SCR and SCREAM.

A limited partner does not individually have a cause of action to recover the loss of his partnership investment resulting from the acts of a general partner (*Blattberg v Weiss*, 61 Misc 2d 564).

However, a general or managing partner of a limited partnership is bound in a fiduciary relationship with the limited partners (*Meinhard v Salmon*, 249 NY 458) and limited partners may bring a class action on behalf of all limited partners where the subject of the action is of common interest (*Lichtyger v Franchard Corp*, 18 NY 2d 528; CPLR 901).

In the present case, there are allegations of fraud, conspiracy, breach



of trust, waste and mismanagement which resulted in the loss of investment and profits. There are questions of common interest to the limited partners (Alpert v Haimes, 64 Misc 2d 608) and are actionable whether or not the recovery for each partner may be different in amount (Ray v Marine Midland Grace Trust, 35 NY 2d 147).

The defendants contend that a class action cannot be maintained because the plaintiff has failed to comply with CPLR 602, which requires that within 60 days after the time to serve a responsive pleading to an action brought as a class action, the plaintiff must move for an order to determine whether it is to be so maintained.

The 60 day requirement is not construed as a statute of limitations (2 Weinstein-Korn-Miller, NY Civ Prac, par 902.02).



In any event, CPLR 902 became effective on September 1, 1975, four years after this action was commenced and subsequent to the time that the amended and supplemental complaint was filed.

While procedural changes are, in the absence of words of exclusion, deemed applicable to subsequent proceedings in pending actions, it takes a clear expression of the legislative purpose to justify a retrospective application of even a procedural statute so as to effect proceedings previously taken in such actions (*Simonson v International Bank*, 14 NY 2d 281). Therefore, the statute would not operate by relation back to invalidate the cause of action because of a failure to move for an order within the 60 day period.

Furthermore, it is noted that with respect to SCREAM, a determination

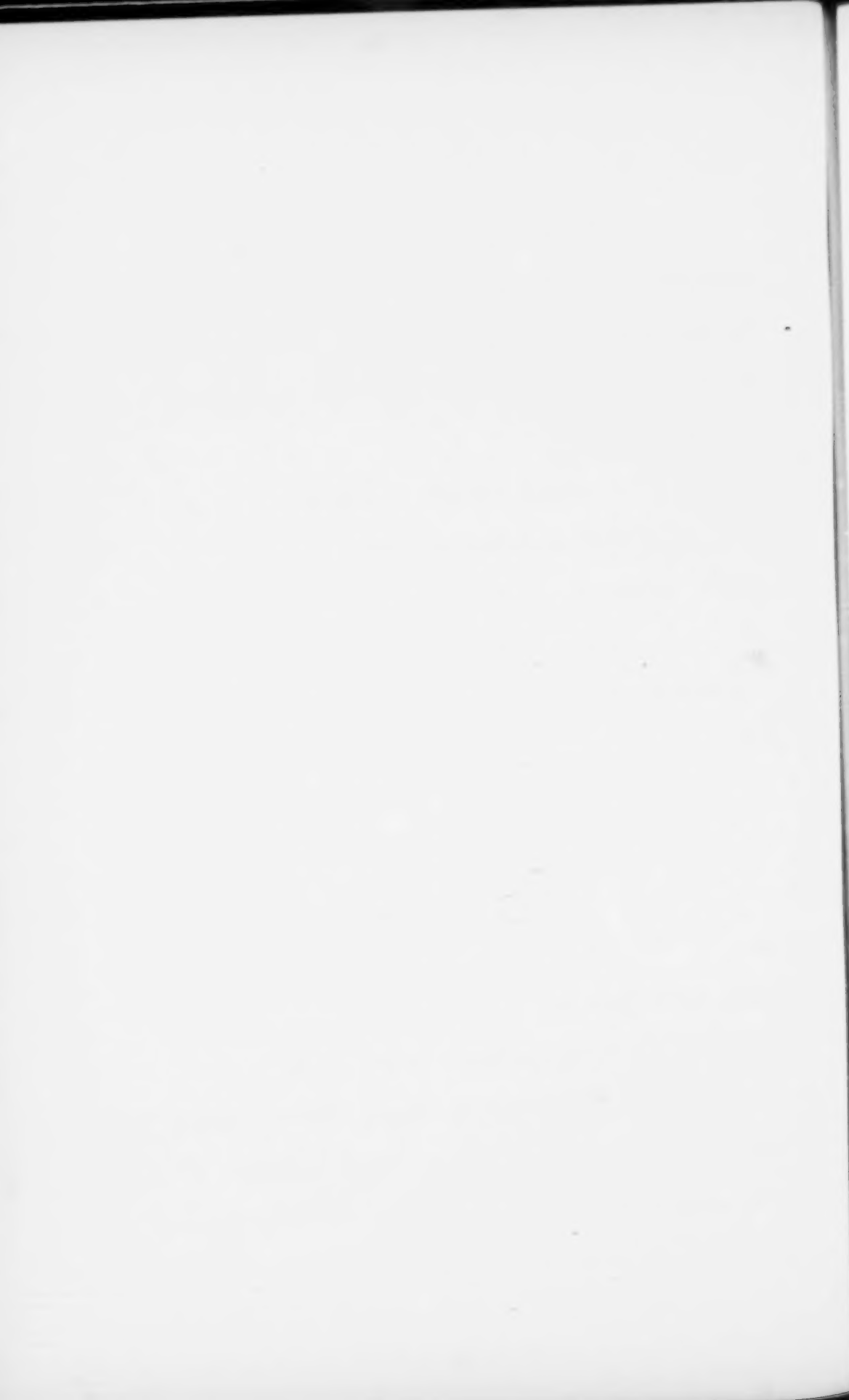
as to whether the action may proceed as a class action cannot be made until such time as Robert Cohen's individual status as a general or limited partner is resolved.

The defendants further contend that the thirteenth, fourteenth and fifteenth cause of action for an accounting should be dismissed on the ground that they fail to state a cause of action. The defendants assert by way of counterclaim that Robert Cohen wrongfully refused to acknowledge an amendment to the Articles of Partnership of the Simon Cohen Company (hereinafter SCC) which includes Reed as a general partner. It is contended that following the death of Robert Cohen, Reed was designated as a general partner pursuant to the original Articles of Partnership.

In the motion to dismiss, however, the defendants aver that Robert Cohen, as a general partner, cannot sue Reed as a limited partner for breach of trust.

Robert Cohen alleges that he was at times a limited partner and at other times a general partner.

Regardless of Reed's status as a general or limited partner Robert Cohen has standing to bring an action for an accounting provided the statutory requirements are satisfied (Partnership Law, §44). Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners, from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property (Partnership Law, §43).



Paragraph "33" of the complaint states that the "first through sixteenth causes of action are brought pursuant to section 115-a of the Partnership Law".

Robert Cohen, as a general partner of SCC, cannot bring a class action as a general partner for breach of trust. Section 115-a has no application here since it applies to derivative suits. However since the complaint states that the thirteenth, fourteenth and fifteenth causes of action for an accounting are brought on behalf of Robert Cohen, individually and as a general partner of SCC, it cannot be said that there is a failure to state a cause of action since Robert Cohen as a general or limited partner is entitled to an accounting.

The defendants raise the defense of laches. This defense



applies only to bar a remedy which is purely equitable. There must be an inexcusable delay and an irreversible detriment to the defendants (Reynolds v Snow, 10 AD 2d 101, affd 8 NY 2d 899). Mere delay will not bar the remedy (Schwartz v Marien, 40 AD 2d 1078).

In the present case, the equitable causes of action are for an accounting, breach of trust and reformation of contract.

Where a plaintiff fails to enforce his remedy to the detriment of the other party, a court of equity may refuse to grant relief even if the statute of limitations is not applicable.

This principle applies to a plaintiff who sues for an accounting. However, as in the case of the application of the statute of limitations to an action based on fraud,



laches on the part of one defrauded cannot arise until he knows of the fraud (Seligson v Weiss, 222 AD 634, 36 NY Jur §158).

Laches would bar the remedy of a partner for an accounting where the plaintiff was either aware of the facts complained of before instituting the action or had access to the relevant information (M & C Creditors Corp v Pratt, 172 Misc 695, affd 255 AD 838, affd 281 NY 804).

In the present case, however, the knowledge which may be attributed to the plaintiff is a question which cannot be disposed of on a motion to dismiss.

The same principles apply to the causes of action for reformation and breach of trust.

The defendants contend that the plaintiff has failed to meet the pleading requirements set forth in



subdivision (b) of CPLR 3016 for fraud and breach of trust, which are alleged to be more stringent than the requirement of CLPR 3013.

The sufficiency of a pleading statement primarily depends upon compliance with section 3013's basic requirements. The special provisions in subdivision (b) of CPLR 3016 constitute no more than a directive that the transaction and occurrences constituting the wrong shall be pleaded with sufficient detail to give adequate notice thereof (Foley v D'Agostino, supra; Hewitt v Maass, 41 Misc 2d 894).

In the present case, the second cause of action and the causes of action numbered "four through fifteen" embrace a forbidden type of deception set forth with sufficient factual specificity so as to identify the transaction and indicate the theory of



redress to enable the court to control the matter and for the adversary to prepare (Guggenheimer v Ginzburg, supra). The sixteenth cause of action for waste and mismanagement is likewise sufficient.

The defendants have demonstrated by their detailed objections that the theories upon which the plaintiff relies are apparent to them. They have acknowledged a recognition of the material elements of the complaint (Hewitt v Maass, supra).

The defendant's contention that the complaint is supported only by conclusory statements rather than facts is without basis.

The defendants have submitted affidavits in support of their motion for summary judgment denying any complicity in a scheme to defraud. They contend that the plaintiff has failed to



come forward with proof sufficient to defeat the motion for summary judgment.

Where there is a motion for summary judgment, the opposing party must come forward with proof to establish a genuine issue of fact (Mallad Construction Corp v County Fed Sav & Loan Assn, 32 NY 2d 285) but this is only where the affidavits in support of the motion have established that there is a right to judgment as a matter of law (Greenberg v Manlon Realty, 43 A D 2d 968).

The defendants have failed to establish that as a matter of law they are entitled to a judgment. Indeed, the extensive affidavits submitted by the defendants make it apparent that there are disputes between the parties with respect to ultimate facts (NY Telephone Co v Telesystems Corp, 27 AD 2d 866).

The referee concludes that as to each cause of action (with the exception of the first and third causes of action) there are issues which cannot be resolved on a motion for summary judgment.

Accordingly, I recommend that the motion for an order granting summary judgment be denied and the motion for an order dismissing the first and third causes of action be granted and the motion for an order dismissing each of the remaining causes of action be denied.

Dated: August 22, 1979.

Respectfully submitted,

/s/ _____
C. RAYMOND RADIGAN,
Referee

SURROGATE'S COURT:
COUNTY OF NASSAU

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ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty: DECISION
Co., suing on behalf of
himself and all other : File No. 148704
partners, both general Dec. No. 192
and limited, and in the: 193
right and on behalf of 194
Simon Cohen Real Estate:
& Management Co., Simon
Cohen Realty Co., Simon:
Cohen Company, and
Aljer Realty Co., :

Plaintiff, :

-against- :

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ELAINE WILSCHEK, J.S.K.:
CLEANING SERVICES,
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC.,
BRIMSCO, INC., SIMON :

COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO., and
ALJER CO., :

Defendants. :

-----X

This complex litigation initially started in the Supreme Court and was transferred here on this court's procedural consent (see Matter of Suchoff, 55 Misc 2d 284). Years of pretrial disclosure have now been completed. The Chief Clerk of this court was appointed on consent of all parties to hear and report on a lengthy motion for summary judgment.

Before the court are three motions to overrule the Referee's Report dated August 22, 1979 which recommended that the defendants' motion for summary judgment with respect to the first and third causes of action in the amended and supplemental complaint be granted and with respect to the remaining causes

of action recommended that the defendants' motion for summary judgment and for an order dismissing each cause of action be denied.

The defendants contend that the Referee erred in denying summary judgment with respect to the 15 remaining causes of action on the grounds that the rules of law pertaining to summary judgment were misconstrued and misapplied by the Referee. In particular, the defendants contend that the Referee has misapplied the principles set forth in *Greenberg v Manlon Realty, Inc.* (43 AD2d 968) by shifting the burden of proof to the defendants to show that they were entitled to judgment as a matter of law before the plaintiff was required "to come forward with evidentiary facts in support of his complaint."

In the present case, the defendants' motion for summary judgment was held in abeyance pending discovery. Following the completion of discovery the plaintiff submitted supplemental affidavits in support of his objection to the motion for summary judgment.

In *Greenberg v Manlon Realty, Inc.* (supra) the Court stated at page 969: "On a motion for summary judgment, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law; anything less requires a denial of the motion, even where the opposing papers are insufficient." It is the moving party, plaintiff or defendant, who has the burden of showing that his motion for summary judgment should be granted. To obtain summary judgment it is necessary that the movant establish his action or

defense sufficiently to warrant the court as a matter of law in directing summary judgment (Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 NY2d 1065);

General conclusory allegations which contain no specific factual references cannot defeat a motion for summary judgment where the movant's papers make out a prima facie case for the grant of the motion (Bank of New York v Progressive Phone Systems, Inc., ____ AD2d ____, NYLJ 10/4/79, p 12). However, to the extent that the defendants failed to establish that they were entitled to judgment as a matter of law, the plaintiff was not required to offer additional proof to defeat the motion for summary judgment.

Taking all the affidavits submitted to this court into consideration, the defendants failed to

show that their motion for summary judgment should be granted. Far from dispelling any conflicts of fact, the affidavits submitted by the plaintiff and defendants crystallized the issues of fact and credibility which await resolution.

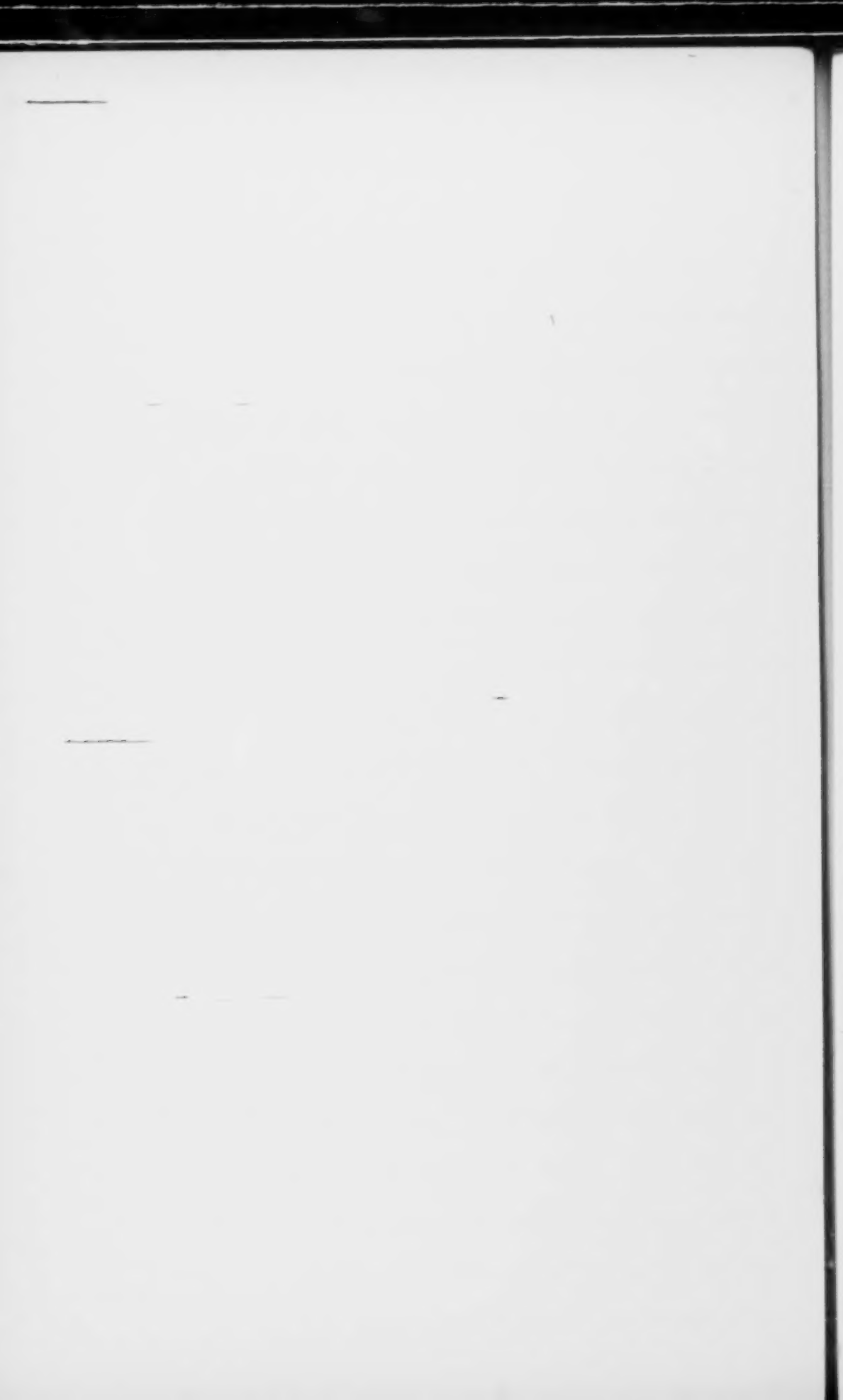
The cases cited by the defendants do not undermine the conclusion reached by the Referee. In *Connell v St. Mary's Hosp. of Troy* (45 NY2d 944), a case cited by the defendants, the Court granted the defendants' motion for summary judgment on the ground that the defendant had established as a matter of law that the plaintiff's cause of action under the insurance policy upon which the complaint was based had terminated and the plaintiff failed to show any issues of fact.

Additional cases cited by the defendants including Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., supra; Apache-Beals Corp v International Adjusters (46 NY2d 888); Fried v Bower & Gardner (46 NY2d 765) hold that evidentiary facts and not conclusory allegations are required to defeat a motion for summary judgment. In the present case the plaintiff satisfied this requirement.

The defendants contend that the statute of limitations is a bar to the fourth, fifth and sixth causes of action in the amended and supplemental complaint on the ground that Robert Reed, William Werner and the executors of the estate of Simon Cohen were not included in the original complaint as defendants with respect to the allegations made in these causes of action. The fourth, fifth and sixth

causes of action concern an alleged scheme to defraud the partners of the Simon Cohen Realty Company.

Paragraph "56" of the original complaint states: "The said ROBERT J. REED has wrongfully, improperly and negligently approved, ratified, acquiesced, permitted and paid out of the treasury and funds of the said Realty Company to SIMON COHEN during his lifetime and/or to the Estate of SIMON COHEN after the death of the decedent, the sum of \$133,784.69 as overpayments" in connection with the Simon Cohen Realty Company. The seventh cause of action in the original complaint names the executors of the estate as defendants and states that the estate is liable for funds due and owing to the Simon Cohen Realty Company. The eighth cause of action in the original complaint is against William Werner in



connection with funds allegedly diverted from the company.

There is a relation back of a pleading where the earlier pleading gives an adverse party sufficient notice of the transaction from which the claim arises (*Cerrato v R. H. Crown Co.*, 58 AD2d 721; CPLR 203 subd. [e]). This requirement was satisfied with respect to the fourth, fifth and sixth causes of action in the amended and supplemental complaint with respect to William Werner, Robert Reed and the executors of the estate of Simon Cohen.

With respect to the ninth and tenth causes of action the executors of the estate of Simon Cohen were added as defendants in 1974 in connection with the alleged siphoning of funds due and owing to the Simon Cohen Real Estate and Management Company from the Mid-Island Hospital.

Since neither Simon Cohen nor the estate of Simon Cohen was included in the original complaint with respect to this alleged scheme, the ninth and tenth causes of action would not relate back to the executors of the estate. The defendants contend that it is clear that the plaintiff knew or should have known of Simon Cohen's complicity in 1971 when the original complaint was served. They conclude that the two-year accrual provision in CPLR 203 subd. [f] does not extend the time for pleading these causes of action to 1974 when the amended and supplemental complaint was served and that the ninth and tenth causes of action are barred by the six-year statute of limitations to the extent that the executors of the estate are defendants.

The purpose of allowing time for discovery proceedings was to permit

both parties to cull facts in support of their respective positions. Whether the plaintiff knew or should have known in 1971, prior to the completion of discovery, that the decedent was involved in a conspiracy to defraud the Simon Cohen Realty Company is a conclusion of fact which awaits determination.

The Referee stated that the two-year accrual provision of CPLR 213 subd. [8] and 203 subd. [f] with respect to the fifth and sixth causes of action could not be used to sustain the allegations of fraud against the defendants Hackell, Potter and First National City Bank individually for acts of fraud which occurred prior to August 1968 but that since an issue of fact exists as to precisely when each of the acts complained of occurred, the motion for summary judgment could not be

granted. The same principle applies to the allegations against the executors of the estate of Simon Cohen in the ninth and tenth causes of action. The question of which transactions are barred by the statute of limitations remains open.

With respect to the partnership status of Robert Cohen in the Simon Cohen Real Estate and Management Company, the defendants contend that the ninth and tenth causes of action should be dismissed to the extent that they apply to events which occurred prior to May 1970 insofar as they are brought under section 115-a of the Partnership Law.

In this complaint the plaintiff states that he was at all times a general partner of Simon Cohen Real Estate & Management Company. However, some of his causes of action

are on behalf of both the limited and general partners of Simon Cohen Real Estate & Management Company. The plaintiff asserts in his memorandum of law, that prior to May 1970 the plaintiff was a general partner in the company but that subsequent to May 1970 he may have become a limited partner by reason of the fact that he submitted a paper purporting to be his resignation as a general partner. Even assuming that the plaintiff was a general partner prior to May 1970, the ninth and tenth causes of action could not be dismissed on the grounds set forth. That part of each of the causes of action which rest on plaintiff's status as a limited partner cannot be dismissed with respect to events occurring prior to 1970 where the dates of the fraudulent transactions alleged to have occurred have not been established.

The defendants seek a dismissal of the 13th, 14th and 15th causes of action insofar as they are brought under §115-a. The defendants state that "There is no suggestion or argument anywhere in the course of this long litigation that plaintiff was ever a limited partner of the Simon Cohen Company." However, Robert Reed, Sidney Hackell, Beatrice Potter and First National City Bank in their answer deny the allegations set forth in paragraph "1" of the amended and supplemental complaint which states that the plaintiff is a general partner in the Simon Cohen Company and William Werner denied knowledge sufficient to form a belief as to the allegation. Furthermore, with respect to the Simon Cohen Company, the plaintiff merely seeks an accounting, to which he is

entitled whether he is a general or limited partner.

With respect to the Simon Cohen Realty Company, the plaintiff claims in his original complaint that the company was terminated by the death of Simon Cohen pursuant to a partnership agreement. The defendants claim that subsequent to his death the parties continued to be associated as a joint venture. They contend that the plaintiff lost his status to bring the action under §115-a of the Partnership Law by reason of the fact that the partnership no longer existed at Simon Cohen's death. Section 115-a of the Partnership Law requires that a partner bringing an action on behalf of the limited partners has status as a limited partner at the time he brings his cause of action. The question as to whether the partnership was terminated or



reconstituted as a joint venture or otherwise is a question of fact and law which awaits determination.

The dissolution of a partnership does not affect the rights of the limited partners to sue derivatively (*Klebanow v New York Produce Exchange*, 344 F2d 294). Furthermore, the argument that the original partnership was converted into a joint venture without dissolution cannot be employed by third parties or former partners to shield themselves from liability for fraud.

Accordingly, the recommendations of the Referee are confirmed.

In the order to be settled as hereinafter provided, the parties should advise the Court if they consent to have the Referee hear and report on the issues of this litigation or if they

wish the Surrogate to try the case and the order should provide for a trial date and said date will depend on whether the Surrogate or Referee is to conduct the trial. An earlier date will be assigned if the Referee is to conduct same because while the Surrogate's Court is up to date and early trials and hearings can be obtained in this court, the Surrogate's calendar is complete for several months due to active litigation in several matters before the Court and he has additional assignments as Acting Supreme Court Judge.

Settle order on five days' notice with three additional days if service is made by mail.

Dated: November 28, 1979.

JOHN D. BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

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In the Matter of the	:	<u>DECISION</u>
Judicial Settlement		
of the Intermediate	:	File No. 148704
Account of Proceedings	:	Dec. No. 314
of BEATRICE POTTER,	:	
ROBERT J. REED, SIDNEY	:	
HACKELL and FIRST	:	
NATIONAL CITY BANK,	:	
as Executors of the	:	
Estate of	:	
	:	
SIMON COHEN,	:	
	:	
Deceased.	:	

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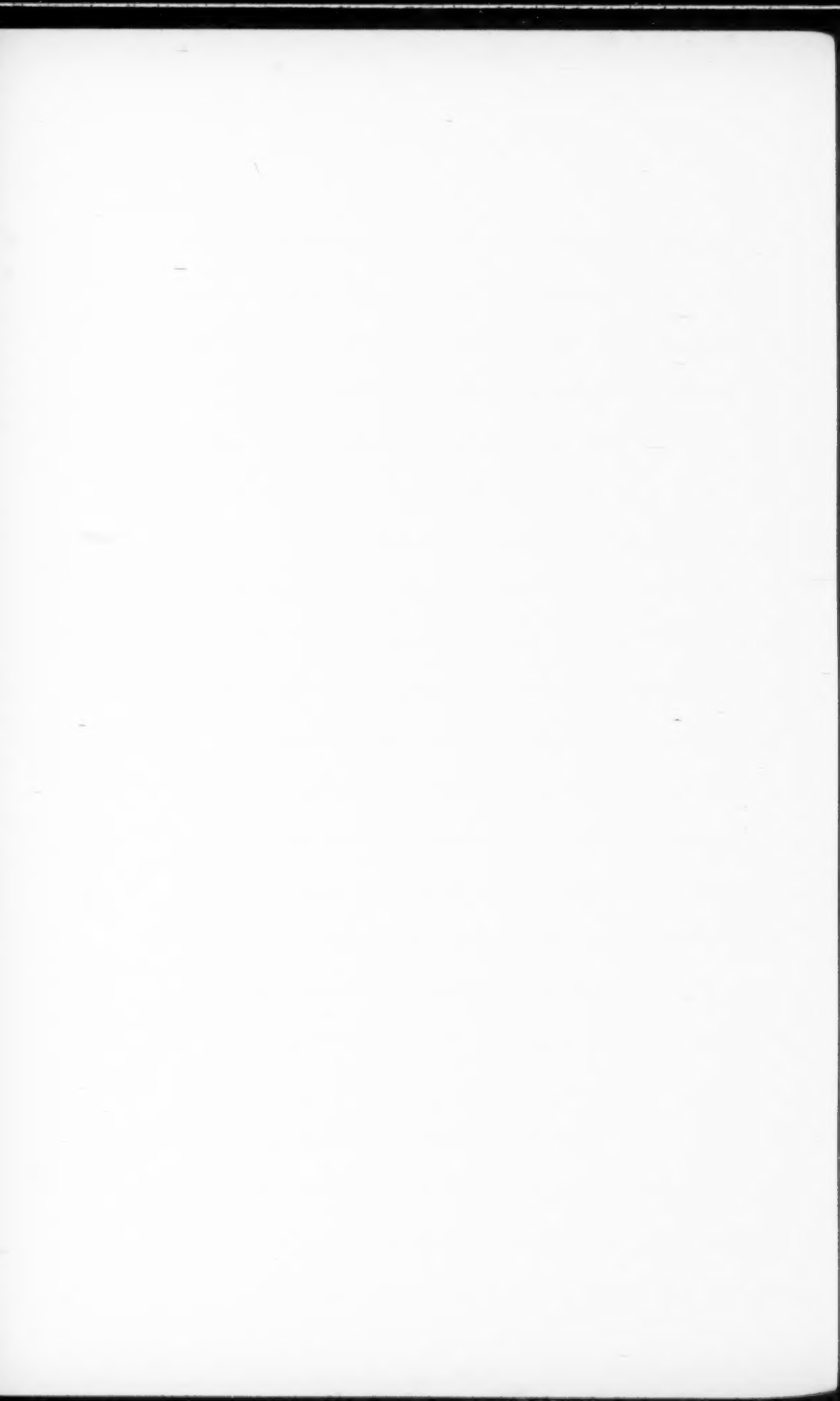
In these accounting proceedings the guardian ad litem moves to have the fiduciaries file a new complete accounting for the period from the date of Deceased's death down to and including August 10, 1977, the date of death of Deceased's widow, a Trust beneficiary under Deceased's Will. It is his contention that the intermediate accounting for the period November 25, 1970 to October 31, 1973 now filed is not in proper form in that this estate



includes trusts and it is necessary to have a breakdown of principal and income with assets, debts and claims allocated to each as well as other allocations.

The position of the guardian ad litem is well taken and the court directs that a full and complete accounting be filed. Any information supplied in the prior accounting which could have been the subject matter of a possible objection from respondents, other than the guardian ad litem, are precluded from offering any objections concerning same when the new accounting is filed, and this will eliminate one of the objections that the fiduciaries had to the relief sought by the guardian ad litem.

As to the time to file the new accounting, the court is mindful of the litigation presently pending in this court and the time that will be



necessary to prepare and try the issues. However, the fiduciaries should start preparing their accounting and be ready to file same within two months from the time that the testimony in the hearing is completed.

The guardian ad litem's motion to amend the above title is also granted.

Settle order on five days' notice with three additional days if service is made by mail.

Dated: December 18, 1979.

JOHN D. BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

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ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real : DECISION
Estate & Management :
Co., Simon Cohen Realty: File No. 148704
Co., suing on behalf of
himself and all other : Dec. 379
partners, both general
and limited, and in the:
right and on behalf of
Simon Cohen Real Estate:
& Management Co., Simon
Cohen Realty Co., Simon:
Cohen Company, and
Aljer Realty Co., :

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE
POTTER, and THE FIRST :
NATIONAL CITY BANK,
Individually and as :
Executors of the Last
Will and Testament of :
Simon Cohen, deceased,
WILLIAM B. F. WERNER, :
Individually and doing
business as Mid-Island :
Hospital, JUAN SOTO,
ELAINE WILSCHEK, J.S.K.:
CLEANING SERVICES,
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC.,
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO., and :
ALJER CO., :

Defendants. :

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An order and counter-order have been submitted pursuant to the decision of this court dated November 28, 1979, and the court finds that the counter-order submitted by Mr. Fiorella covers the issues decided by the court and will be signed if found to be in proper form after there is added to the first ordering paragraph on page -7- after the word presiding "unless all parties consent to have the referee hear and report," and the second ordering paragraph on that page is changed so as to provide that the trial will commence on March 4, 1980.



A86

Proceed accordingly.

Dated: December 19, 1979

JOHN D. BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:

COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty: :
Co., suing on behalf of :
himself and all other :
partners, both general :
and limited, and in the: :
right and on behalf of :
Simon Cohen Real Estate: :
& Management Co., Simon :
Cohen Realty Co., Simon: :
Cohen Company, and :
Aljer Realty Co., :

ORDER

File No.
148704

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
Individually and as :
Executors of the Last :
Will and Testament of :
Simon Cohen, deceased, :
WILLIAM B. B. WERNER, :
Individually and doing :
business as Mid-Island :
Hospital, JUAN SOTO, :
ELAINE WILSCHEK, J.S.K.: :
CLEANING SERVICES, :
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON :
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC., :
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO., and
ALJER CO., :

Defendants. :

-----X

Defendants having moved by
notices of motion dated September 6,
1979, and September 11, 1979, for an
order to reject the report of the
Referee dated August 22, 1979, and the
defendants having appeared by Messrs.
Speno, Goldberg, Moore, MaRGULES &
Corcoran, Robert W. Corcoran, Esq., of
counsel, Albert J. Fiorella, Esq., and
Messrs. Lubell and Koven, Murray Koven,
Esq., of counsel, and the plaintiff
having appeared in opposition thereto by
Stephen Hochhauser, Esq., and due
deliberation having been had thereon,
and a memorandum decision having been
rendered on November 28, 1979.

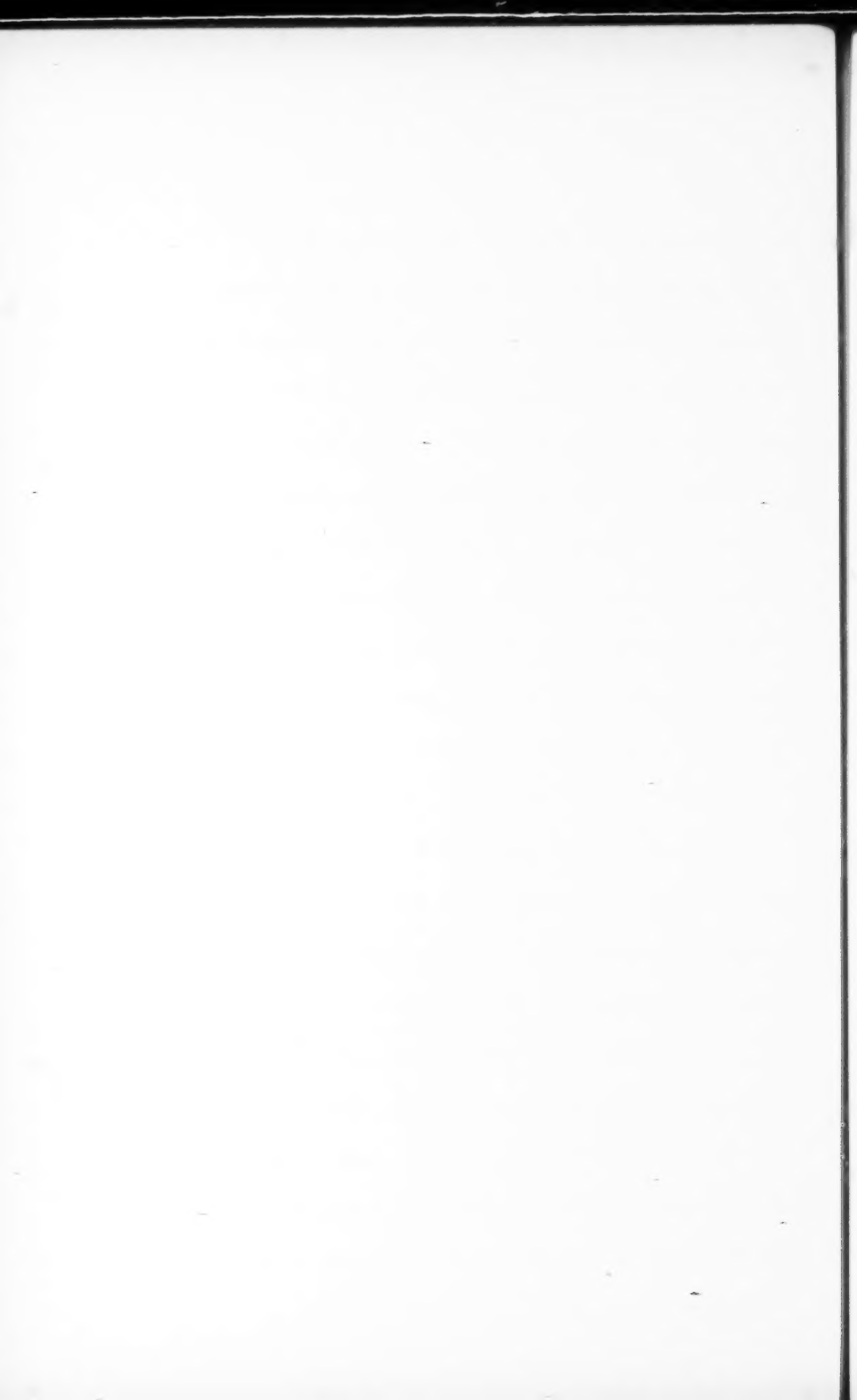
NOW THEREFORE, upon the
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows:

(1) Original summons and complaint dated August 13, 1971, defendants' answer and counterclaim, dated December 22, 1971, plaintiff's reply, dated May 25, 1972;

(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;



(3) Depositions of Robert Reed, dated December 13, 1972, December 20, 1972, January 12, 1972, February 8, 1973, March 9, 1973, and March 29, 1973, together with plaintiff's Exhibits 1 through 49;

(4) Depositions of Mid-Island Hospital dated October 25, 1973, Beatrice Potter, dated October 25, 1973, Sidney Hackell, dated October 25, 1973, and First National City Bank by Henry McKenzie, dated October 25, 1973;

(5) The affidavit of Robert Reed, dated March 13, 1974;

(6) Plaintiff's supplemental summons and amended and supplemental complaint, dated July 24, 1974, defendant's answers filed June 12, 1975 (Feinerman), June 6, 1975 (Soto, et al.), October 18, 1974 (Executors et al.); plaintiff's reply, dated November 1, 1974;



(7) Transcript of testimony with defendants' Exhibits 1 through 6, on motion for summary judgment, dated February 25, 1975 and February 26, 1975;

(8) Depositions of Sidney Hackell, dated May 2, 1977, May 3, 1977, May 4, 1977, May 27, 1977, June 15, 1977, and October 4, 1977, with plaintiff's Exhibits 50 through 62;

(9) Depositions of Sheldon Katz and Volume Feeding, dated May 6, 1977 and November 17, 1977, with plaintiff's Exhibit 63;

(10) Depositions of Judah Feinerman and Jasdane, Inc., dated May 16, 1977 and October 25, 1977;

(11) Depositions of Juan Soto and J.S.K. Cleaning Services, Inc., dated May 9, 1977 and November 28, 1977, with plaintiff's Exhibits 64 and 65;

(12) Deposition of Brimsco, Inc., by Robert Reed, dated May 10,



1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2;—Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(15) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1978,

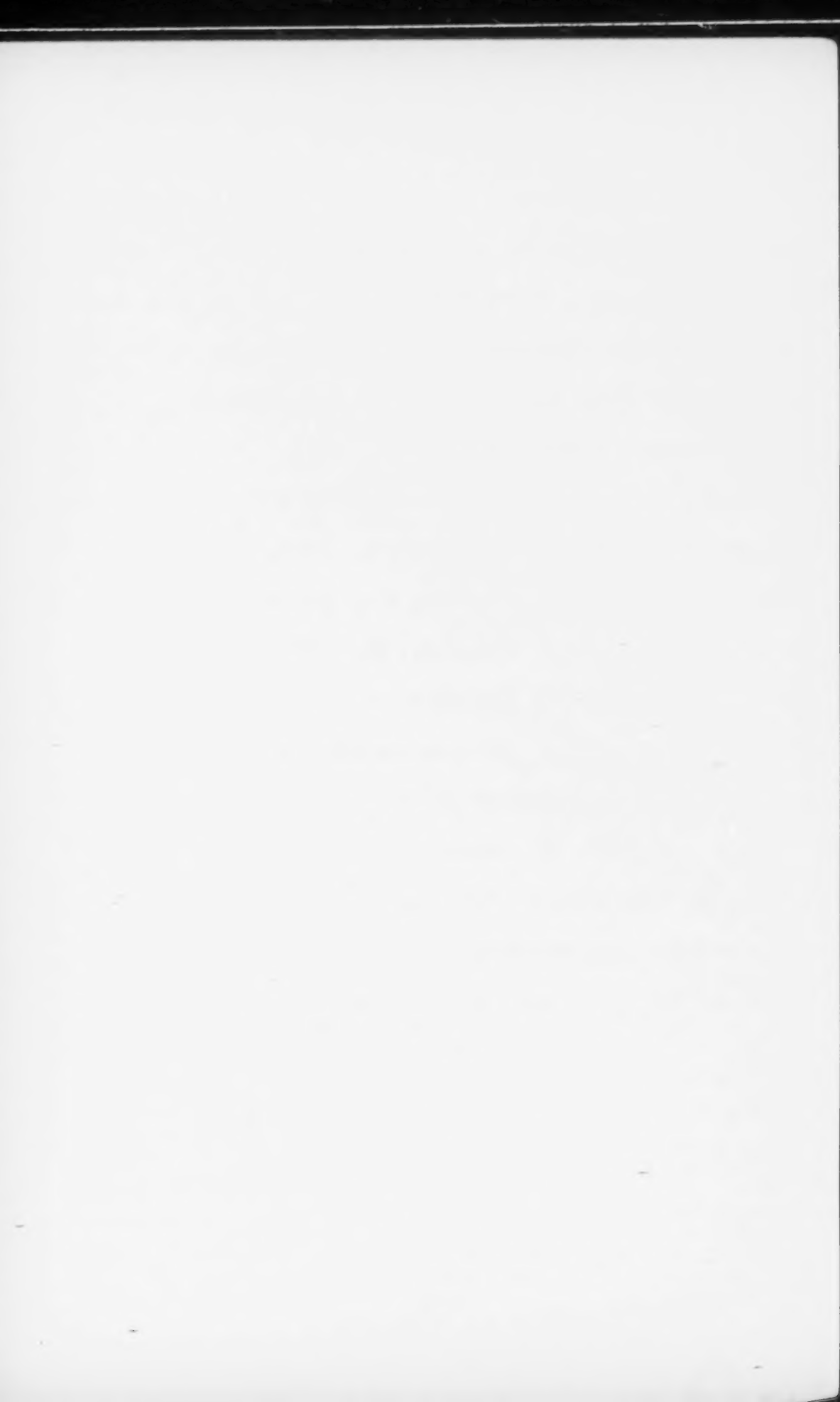


September 19, 1978, and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

(16) Depositions of Stephen Hochhauser, dated January 8, 1979, January 11, 1979, January 16, 1979, January 17, 1979, January 19, 1979, January 24, 1979, January 25, 1979, January 29, 1979, January 30, 1979, January 31, 1979, February 2, 1979, February 3, 1979, with defendant's Exhibits G-11 through I-15;

(17) Affidavits submitted and read on the motion for summary judgment with Exhibits annexed:

- (a) Sidney Hackell, dated December 31, 1976;
- (b) Robert Reed, dated December 31, 1976;
- (c) Leon Goodman, dated December 3, 1976;
- (d) William B.F. Werner, dated December 28, 1976;



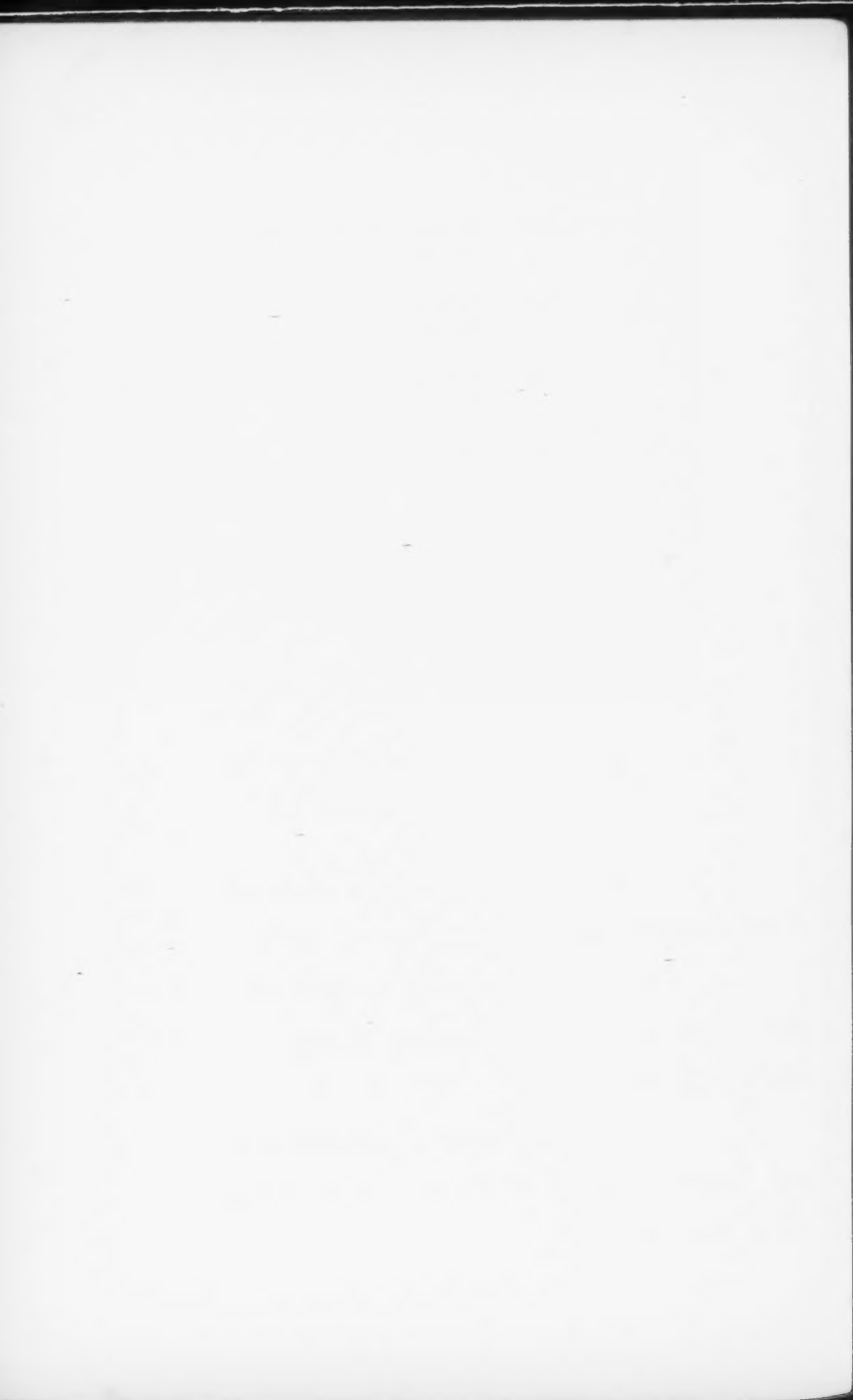
- (e) Robert Cohen, dated
September 26, 1975,
December 29, 1975,
March 14, 1979;
- (f) Arthur Press, dated
May 12, 1979;
- (g) Bernd Bildstein,
dated May 8, 1979;
- (h) Supplemental
affidavit of
Stephen Hochhauser,
dated April 4, 1979;
- (i) Second supplemental
affidavit of Robert
Cohen, dated
June 13, 1979;
- (j) Stephen Hochhauser,
dated June 19, 1979;
- (k) Additional affidavit
of Judah Feinerman,
dated June 18, 1979;
- (l) Sidney Hackell,
dated July 23, 1979;
- (m) Robert J. Reed,
dated July 23, 1979;
- (n) Melvin Schneider,
dated February 5,
1979;
- (o) Harry Oster, dated
June 29, 1979;

- (p) Beatrice Potter,
dated July 23, 1979;
- (q) Albert J. Fiorella,
dated July 23, 1979;
- (r) Sheldon Katz, dated
July 23, 1979;
- (s) Jaun Soto, dated
July 23, 1979;
- (t) Elaine Wilschek,
dated July 23, 1979;
- (u) Howard S. Weisman,
dated July 23, 1979;
- (v) Stephen Hochhauser,
dated July 30, 1979;
- (w) Reply affidavit of
Sidney Hackell,
dated August 10,
1979.

(18) The plaintiff's Bill of
Particulars, dated September 3, 1975;

(19) Plaintiff's answers to
defendant's Interrogatories, dated
September 20, 1975;

(20) Plaintiff's amended and
Supplemental Bill of Particulars, dated
July 26, 1978;



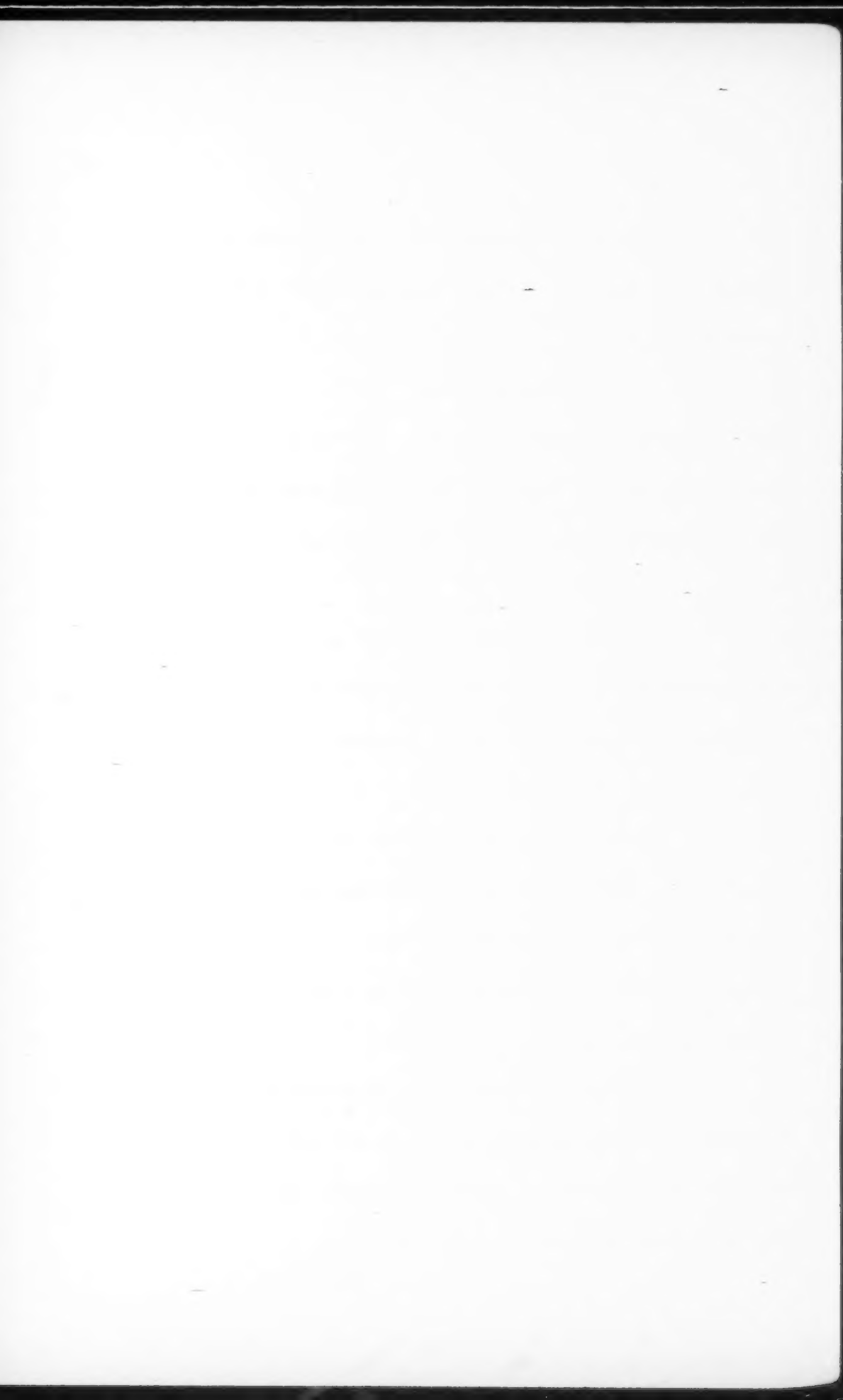
(21) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

(22) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977;

(23) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

and upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied and it is further



ORDERED that the said
Referee's Report be and the same is
hereby confirmed in all respects, and it
is further

ORDERED that the First and
Third Causes of Action be and the same
are hereby dismissed, and it is further

ORDERED that trial of the
issues be had before the Judge presiding
unless all parties consent to have the
referee hear and report, and it is
further

ORDERED that such trial shall
commence on or after March 4, 1980.

/s/
Surrogate

[ENTERED December 19, 1979.]



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty :
Co., suing on behalf of :
himself and all other :
partners, both general :
and limited, and in the :
right and on behalf of :
Simon Cohen Real Estate :
& Management Co., Simon :
Cohen Realty Co., Simon :
Cohen Company, and :
Aljer Realty Co., :

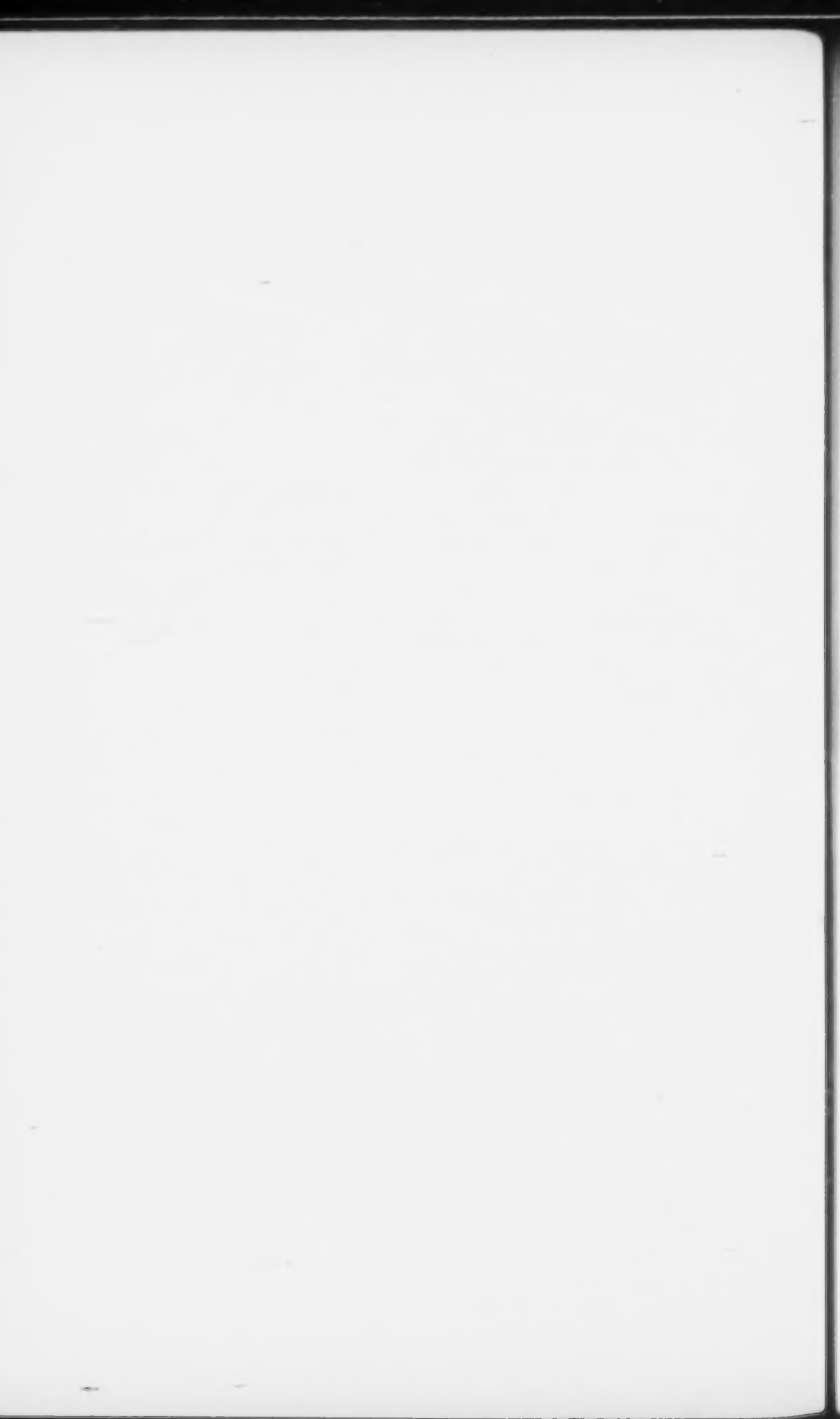
ORDER

File No.
148704

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
Individually and as :
Executors of the Last :
Will and Testament of :
Simon Cohen, deceased, :
WILLIAM B. B. WERNER, :
Individually and doing :
business as Mid-Island :
Hospital, JUAN SOTO, :
ELAINE WILSCHEK, J.S.K.:
CLEANING SERVICES, :
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON :
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC., :
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO.. and
ALJER CO., :

Defendants. :
-----X

Defendants having moved by
notices of motion dated September 6,
1979, and September 11, 1979, for an
order to reject the report of the
Referee dated August 22, 1979, and the
defendants having appeared by Messrs.
Speno, Goldberg, Moore, MARGULES &
Corcoran, Robert W. Corcoran, Esq., of
counsel, Albert J. Fiorella, Esq., and
Messrs. Lubell and Koven, Murray Koven,
Esq., of counsel, and the plaintiff
having appeared in opposition thereto by
Stephen Hochhauser, Esq., and due
deliberation having been had thereon,
and a memorandum decision having been
rendered on November 28, 1979.

NOW THEREFORE, upon the
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows;

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(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;



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1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2; Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(15) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1979, September 19, 1978,

and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

(16) Depositions of Stephen Hochhauser, dated January 8, 1979, January 11, 1979, January 16, 1979, January 17, 1979, January 19, 1979, January 24, 1979, January 25, 1979, January 29, 1979, January 30, 1979, January 31, 1979, February 2, 1979, February 3, 1979, with defendant's Exhibits G-11 through I-15;

(17) Affidavits submitted and read on the motion for summary judgment with Exhibits annexed:

- (a) Sidney Hackell,
dated December 31,
1976;
- (b) Robert Reed, dated
December 31, 1976;
- (c) Leon Goodman, dated
December 3, 1976;
- (d) William B.F. Werner,
dated December 28,
1976;

- (e) Robert Cohen, dated
September 26, 1975,
December 29, 1975,
March 14, 1979;
- (f) Arthur Press, dated
May 12, 1979;
- (g) Bernd Bildstein,
dated May 8, 1979;
- (h) Supplemental
affidavit of
Stephen Hochhauser,
dated April 4, 1979;
- (i) Second supplemental
affidavit of Robert
Cohen, dated
June 13, 1979;
- (j) Stephen Hochhauser,
dated June 19, 1979;
- (k) Additional affidavit
of Judah Feinerman,
dated June 18, 1979;
- (l) Sidney Hackell,
dated July 23, 1979;
- (m) Robert J. Reed,
dated July 23, 1979;
- (n) Melvin Schneider,
dated February 5,
1979;
- (o) Harry Oster, dated
June 29, 1979;
- (p) Beatrice Potter,
dated July 23, 1979;

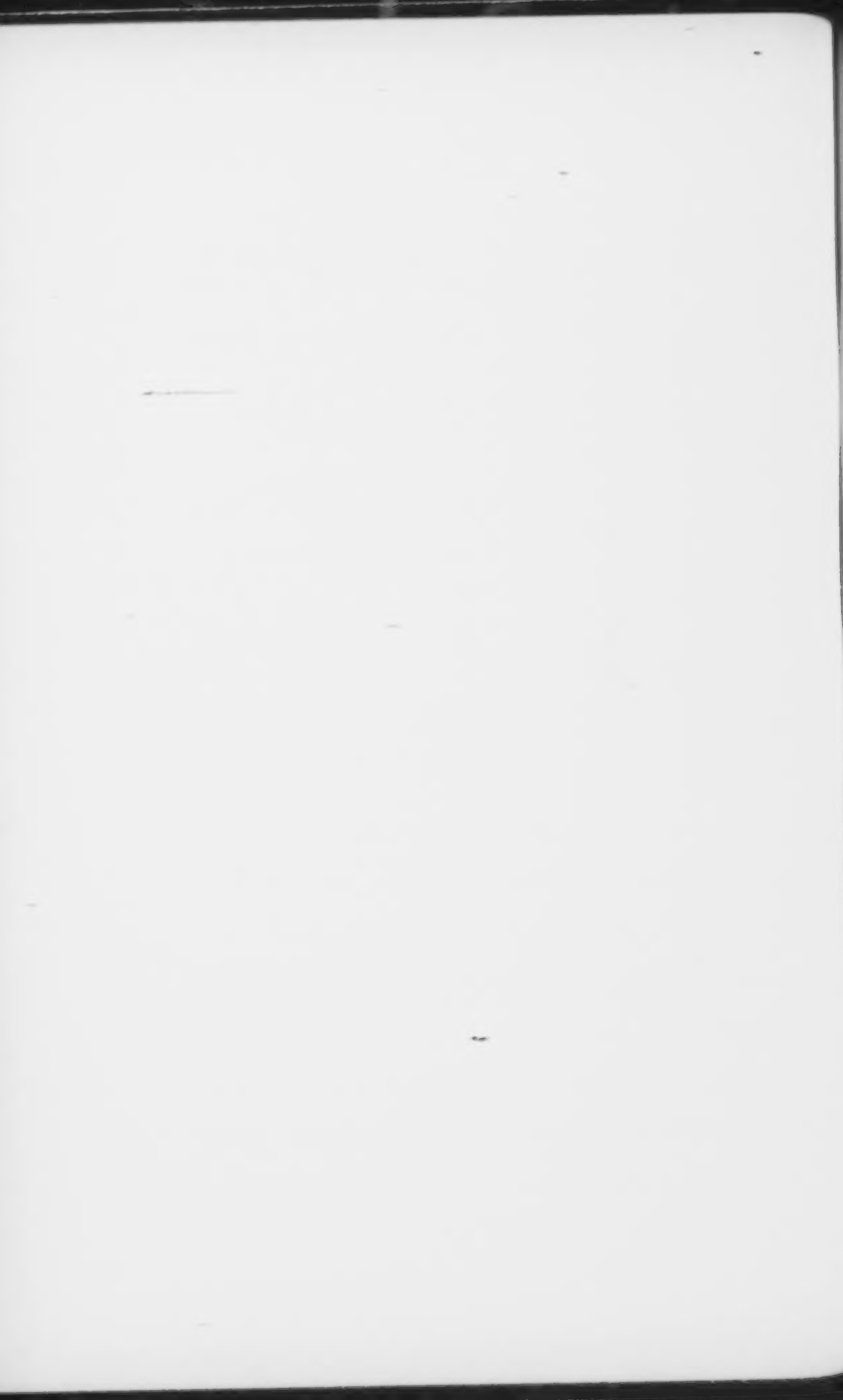


- (q) Albert J. Fiorella,
dated July 23, 1979;
- (r) Sheldon Katz, dated
July 23, 1979;
- (s) Jaun Soto, dated
July 23, 1979;
- (t) Elaine Wilschek,
dated July 23, 1979;
- (u) Howard S. Weisman,
dated July 23, 1979;
- (v) Stephen Hochhauser,
dated July 30, 1979;
- (w) Reply affidavit of
Sidney Hackell,
dated August 10,
1979.

(18) The plaintiff's Bill of
Particulars, dated September 3, 1975;

(19) Plaintiff's answers to
defendant's Interrogatories, dated
September 20, 1975;

(20) Plaintiff's amended and
Supplemental Bill of Particulars, dated
July 26, 1978;



(21) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

(22) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977;

(23) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

and upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied, and it is further



ORDERED that the said
Referee's Report be and the same is
hereby confirmed in all respects, and it
is further

ORDERED that the First and
Third Causes of Action be and the same
are hereby dismissed, and it is further

ORDERED that trial of the
issues be had before the judge presiding
unless all parties consent to have the
referee hear and report, and it is
further

ORDERED that such trial shall
commence on March 4, 1980.

/s/ John D. Bennett
- Judge of the
Surrogate's Court

[ENTERED December 20, 1979.]



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty: RESETTLED ORDER
Co., suing on behalf of :
himself and all other : File No. 148704
partners, both general
and limited, and in the:
right and on behalf of
Simon Cohen Real Estate:
& Management Co., Simon
Cohen Realty Co., Simon:
Cohen Company, and
Aljer Realty Co., :

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
Individually and as :
Executors of the Last :
Will and Testament of :
Simon Cohen, deceased, :
WILLIAM B. B. WERNER, :
Individually and doing :
business as Mid-Island :
Hospital, JUAN SOTO, :
ELAINE WILSCHEK, J.S.K.:
CLEANING SERVICES, :
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON :
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC., :
BRIMSCO, INC., SIMON :



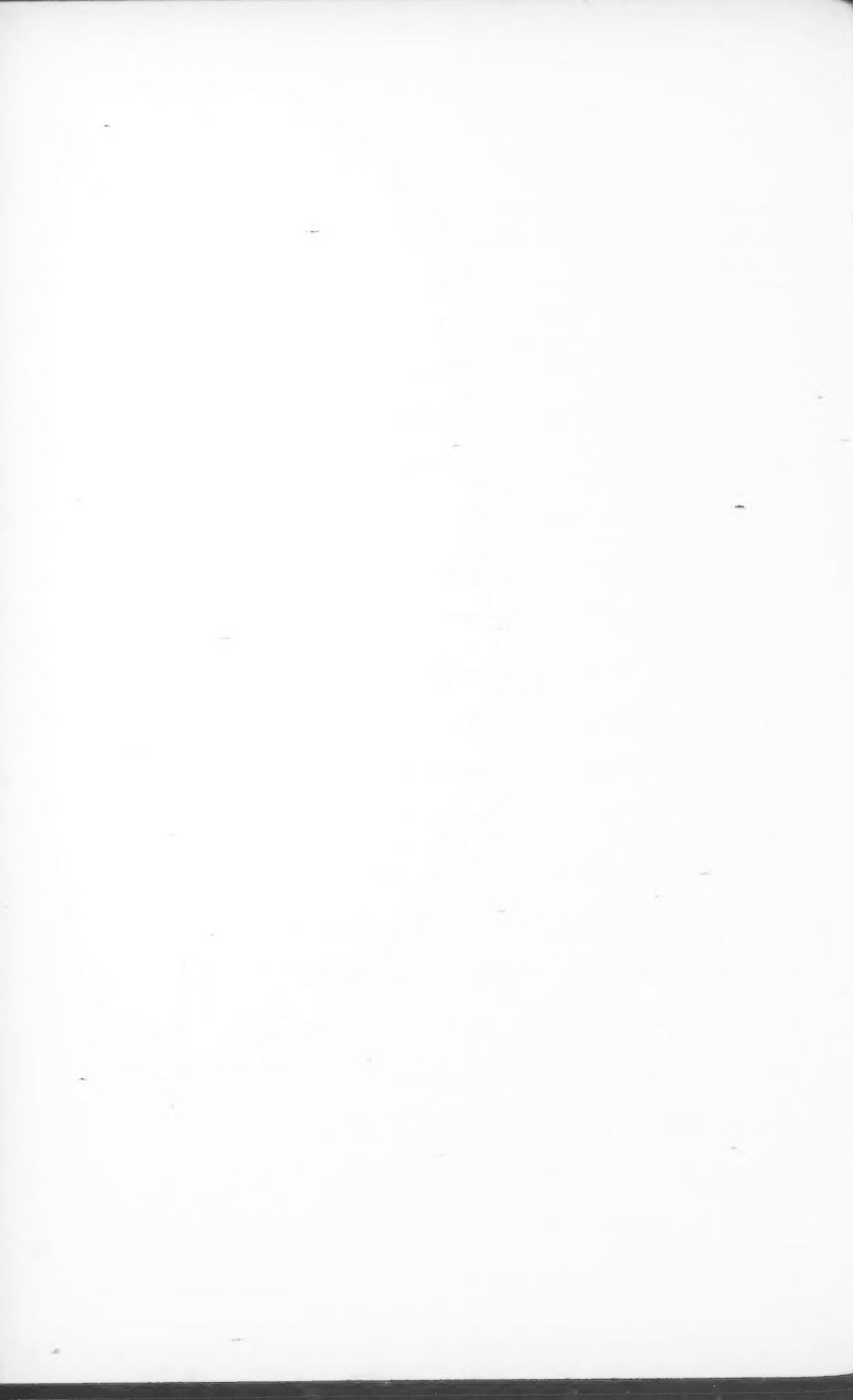
COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO.. and
ALJER CO., :

Defendants. :

-----X

Defendants having moved by
notices of motion dated September 6,
1979, and September 11, 1979, for an
order to reject the report of the
Referee dated August 22, 1979, and the
defendants having appeared by Messrs.
Speno, Goldberg, Moore, MaRGULES &
Corcoran, Robert W. Corcoran, Esq., of
counsel, Albert J. Fiorella, Esq., and
Messrs. Lubell and Koven, Murray Koven,
Esq., of counsel, and the plaintiff
having appeared in opposition thereto by
Stephen Hochhauser, Esq., and due
deliberation having been had thereon,
and a memorandum decision having been
rendered on November 28, 1979,

NOW, THEREFORE, upon the
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows;

(1) Original summons and complaint dated August 13, 1971, defendants' answer and counterclaim, dated December 22, 1971, plaintiff's reply, dated May 25, 1972;

(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;

(3) Depositions of Robert Reed, dated December 13, 1972, December 20, 1972, January 12, 1972, February 8, 1973, March 9, 1973, and March 29, 1973, together with plaintiff's Exhibits 1 through 49;

(4) Depositions of Mid-Island Hospital dated October 25, 1973, Beatrice Potter, dated October 25, 1973, Sidney Hackell, dated October 25, 1973, and First National City Bank by Henry McKenzie, dated October 25, 1973;

(5) The affidavit of Robert Reed, dated March 13, 1974;

(6) Plaintiff's supplemental summons and amended and supplemental complaint, dated July 24, 1974, defendant's answers filed June 12, 1975 (Feinerman), June 6, 1975 (Soto, et al.), October 18, 1974 (Executors et al.); plaintiff's reply, dated November 1, 1974;



(7) Transcript of testimony with defendants' Exhibits 1 through 6, on motion for summary judgment, dated February 25, 1975 and February 26, 1975;

(8) Depositions of Sidney Hacekill, dated May 2, 1977, May 3, 1977, May 27, 1977, June 15, 1977, and October 4, 1977, with plaintiff's Exhibits 50 through 62;

(9) Depositions of Sheldon Katz and Volume Feeding, dated May 6, 1977 and November 17, 1977, with plaintiff's Exhibit 63;

(10) Depositions of Judah Feinerman and Jasdane, Inc., dated May 16, 1977 and October 25, 1977;

(11) Depositions of Juan Soto and J.S.K. Cleaning Services, Inc., dated May 9, 1977 and November 28, 1977, with plaintiff's Exhibits 64 and 65;

(12) Deposition of Brimsco, Inc., by Robert Reed, dated May 10,



1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2; Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(15) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1979, September 19, 1978,

and September 20, 1978 (rulings), with
defendants' Exhibits AAA through F11;

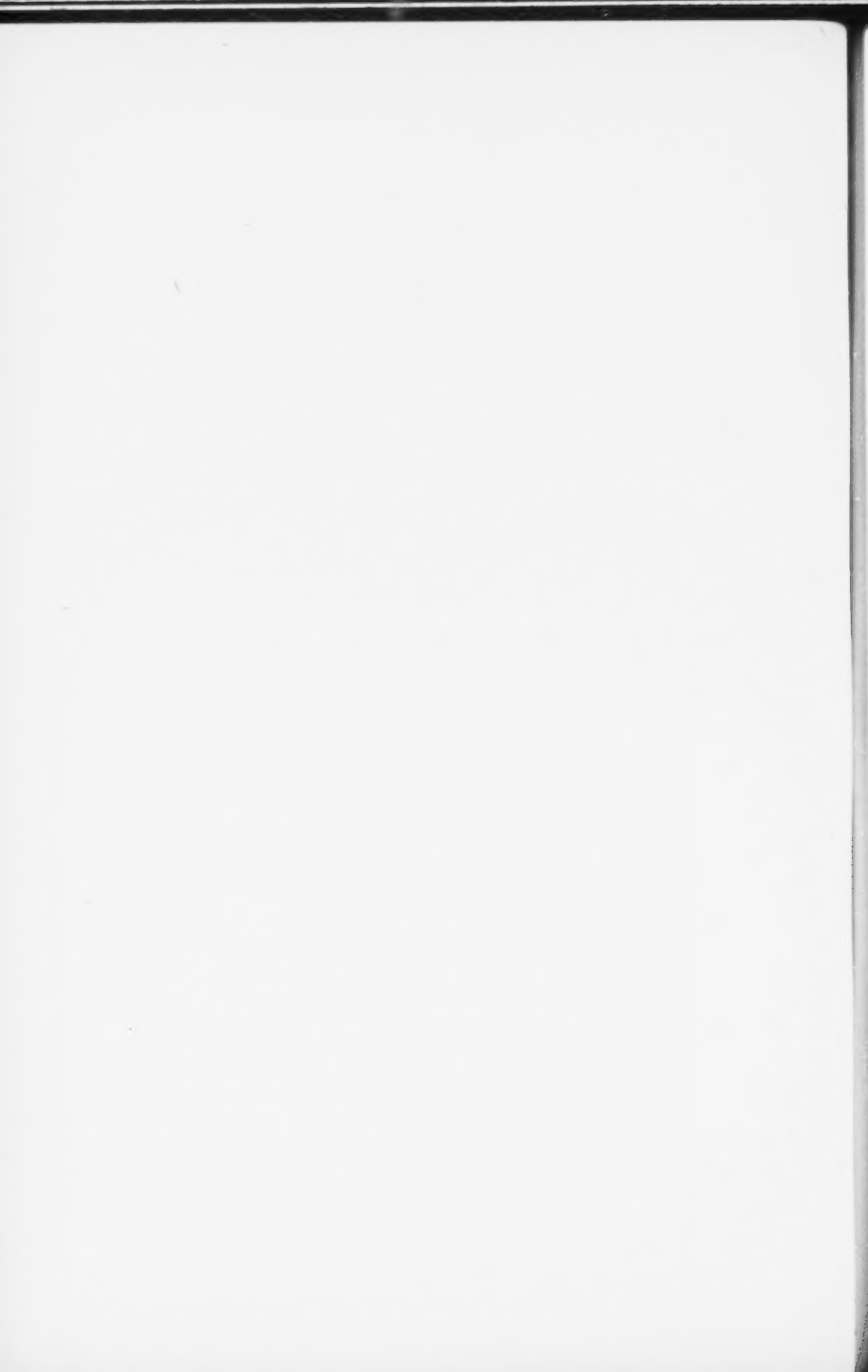
(16) Depositions of Stephen
Hochhauser, dated January 8, 1979,
January 11, 1979, January 16, 1979,
January 17, 1979, January 19, 1979,
January 24, January 25, 1979,
January 29, 1979, January 30, 1979,
January 31, 1979, February 2, 1979,
February 3, 1979, with defendant's
Exhibits G-11 through I-15;

(17) Affidavits submitted and
read on the motion for summary judgment
with Exhibits annexed:

- (a) Sidney Hackell,
dated December 31,
1976;
- (b) Robert Reed, dated
December 31, 1976;
- (c) Leon Goodman, dated
December 3, 1976;
- (d) William B.F. Werner,
dated December 28,
1976;



- (e) Robert Cohen, dated
September 26, 1975,
December 29, 1975,
March 14, 1979;
- (f) Arthur Press, dated
May 12, 1979;
- (g) Bernd Bildstein,
dated May 8, 1979;
- (h) Supplemental
affidavit of
Stephen Hochhauser,
dated April 4, 1979;
- (i) Second supplemental
affidavit of Robert
Cohen, dated
June 13, 1979;
- (j) Stephen Hochhauser,
dated June 19, 1979;
- (k) Additional affidavit
of Judah Feinerman,
dated June 18, 1979;
- (l) Sidney Hackell,
dated July 23, 1979;
- (m) Robert J. Reed,
dated July 23, 1979;
- (n) Melvin Schneider,
dated February 5,
1979;
- (o) Harry Oster, dated
June 29, 1979;
- (p) Beatrice Potter,
dated July 23, 1979;

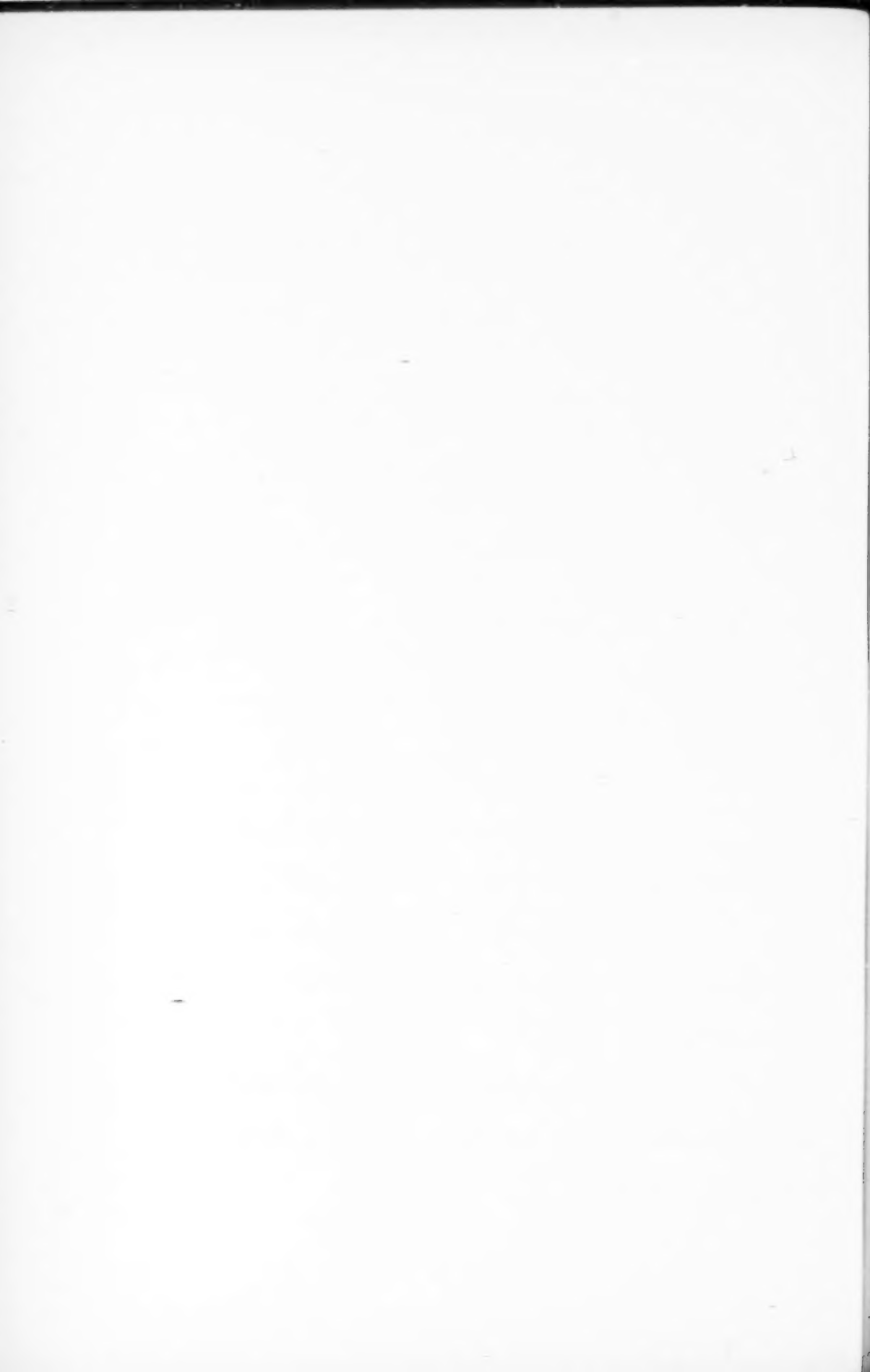


- (q) Albert J. Fiorella,
dated July 23, 1979;
- (r) Sheldon Katz, dated
July 23, 1979;
- (s) Jaun Soto, dated
July 23, 1979;
- (t) Elaine Wilschek,
dated July 23, 1979;
- (u) Howard S. Weisman,
dated July 23, 1979;
- (v) Stephen Hochhauser,
dated July 30, 1979;
- (w) Reply affidavit of
Sidney Hackell,
dated August 10,
1979.

(18) The plaintiff's Bill of
Particulars, dated September 3, 1975;

(19) Plaintiff's answers to
defendant's Interrogatories, dated
September 20, 1975;

(20) Plaintiff's amended and
Supplemental Bill of Particulars, dated
July 26, 1978;



(21) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

(22) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977;

(23) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

and upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied and it is further



ORDERED that the said
Referee's Report be and the same is
hereby confirmed in all respects, and it
is further

ORDERED that the First and
Third Causes of Action be and the same
are hereby dismissed, and it is further

ORDERED that the motion made
by defendants, JUAN SOTO, ELAINE
WILSCHEK, J.S.K. CLEANING SERVICES,
INC., JUDAH FEINERMAN, JASDANE, INC.,
SHELDON KATZ and VOLUME FEEDING, INC.,
for summary judgment dismissing the
Tenth Cause of Action in the Amended and
Supplemental Complaint be, and the same
hereby is, denied, and it is further

ORDERED that trial of the
issues be had before the Judge presiding
unless all parties consent to have the
referee hear and report, and it is
further



A120

ORDERED that such trial shall
commence on or after March 4, 1980

/s/ John D. Bennett
Judge of the
Surrogate's Court

[ENTERED January 11, 1980.]



SURROGATE'S COURT:

COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty: :
Co., suing on behalf of :
himself and all other :
partners, both general :
and limited, and in the: :
right and on behalf of :
Simon Cohen Real Estate: :
& Management Co., Simon :
Cohen Realty Co., Simon: :
Cohen Company, and :
Aljer Realty Co., :

ORDER

File No.
148704

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
Individually and as :
Executors of the Last :
Will and Testament of :
Simon Cohen, deceased, :
WILLIAM B. B. WERNER, :
Individually and doing :
business as Mid-Island :
Hospital, JUAN SOTO, :
ELAINE WILSCHEK, J.S.K.: :
CLEANING SERVICES, :
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON :
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC., :
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO.. and
ALJER CO., :

Defendants. :

-----X

Defendants having moved by
notices of motion dated September 6,
1979, and September 11, 1979, for an
order to reject the report of the
Referee dated August 22, 1979, and the
defendants having appeared by Messrs.
Speno, Goldberg, Moore, Margules &
Corcoran, Robert W. Corcoran, Esq., of
counsel, Albert J. Fiorella, Esq., and
Messrs. Lubell and Koven, Murray Koven,
Esq., of counsel, and the plaintiff
having appeared in opposition thereto by
Stephen Hochhauser, Esq., and due
deliberation having been had thereon,
and a memorandum decision having been
rendered on November 28, 1979,

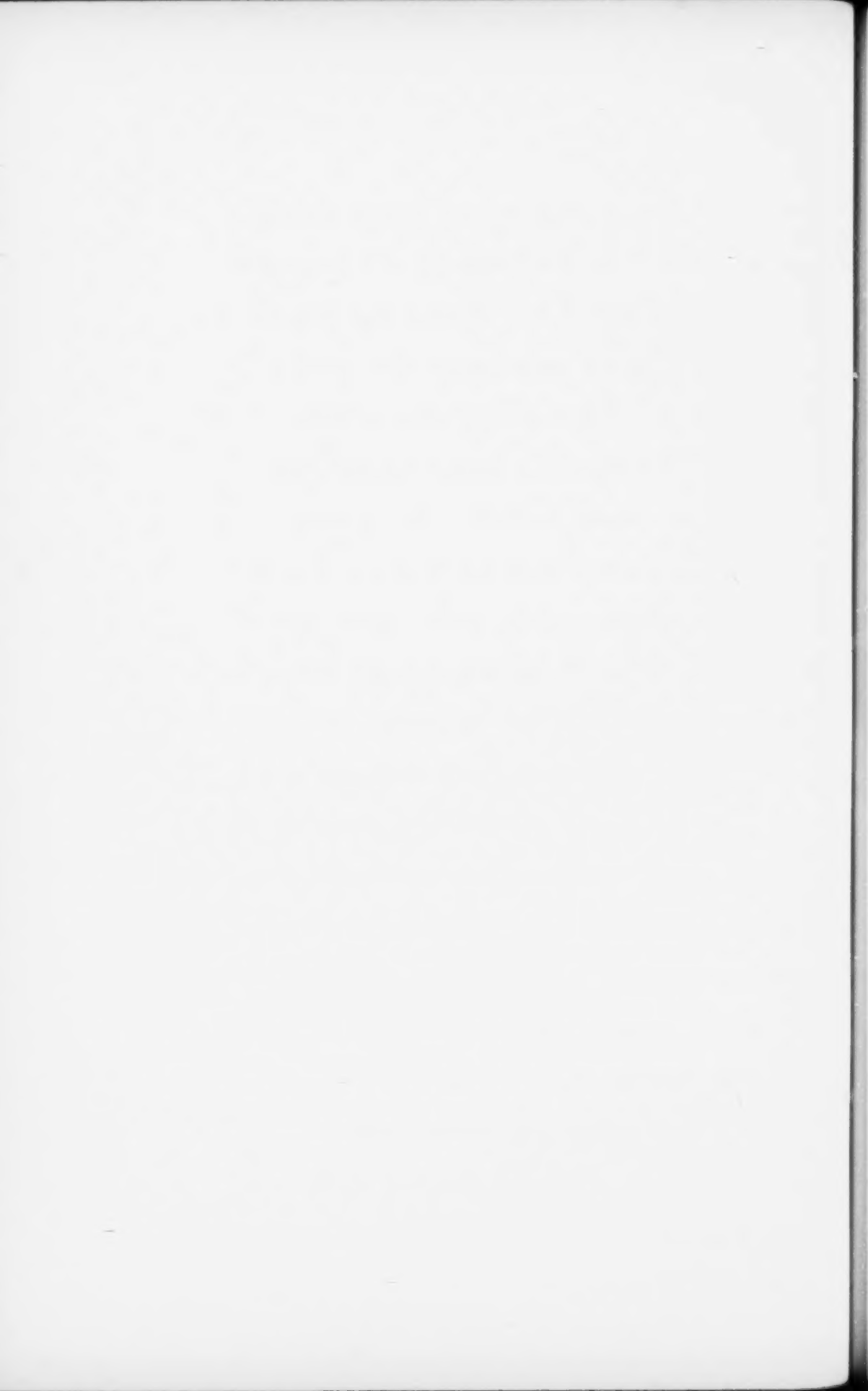
NOW, THEREFORE, upon the
aforesaid notices of motion, the



affidavits of Murray T. Koven dated September 6, 1979, Robert W. Corcoran dated September 11, 1979, and Albert J. Fiorella dated September 11, 1979, in support of the motion, the affidavit of Stephen Hochhauser dated September 17, 1979, in opposition to the motion, the rejoinder affidavit of Morris Rochman dated September 12, 1979, upon the record searched on the motion for summary judgment as follows;

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(2) Depositions of Robert Cohen, dated July 6, 1972, July 20, 1972, September 13, 1972, and December 13, 1972, together with defendant's Exhibits A through Z and A-A through F-F;

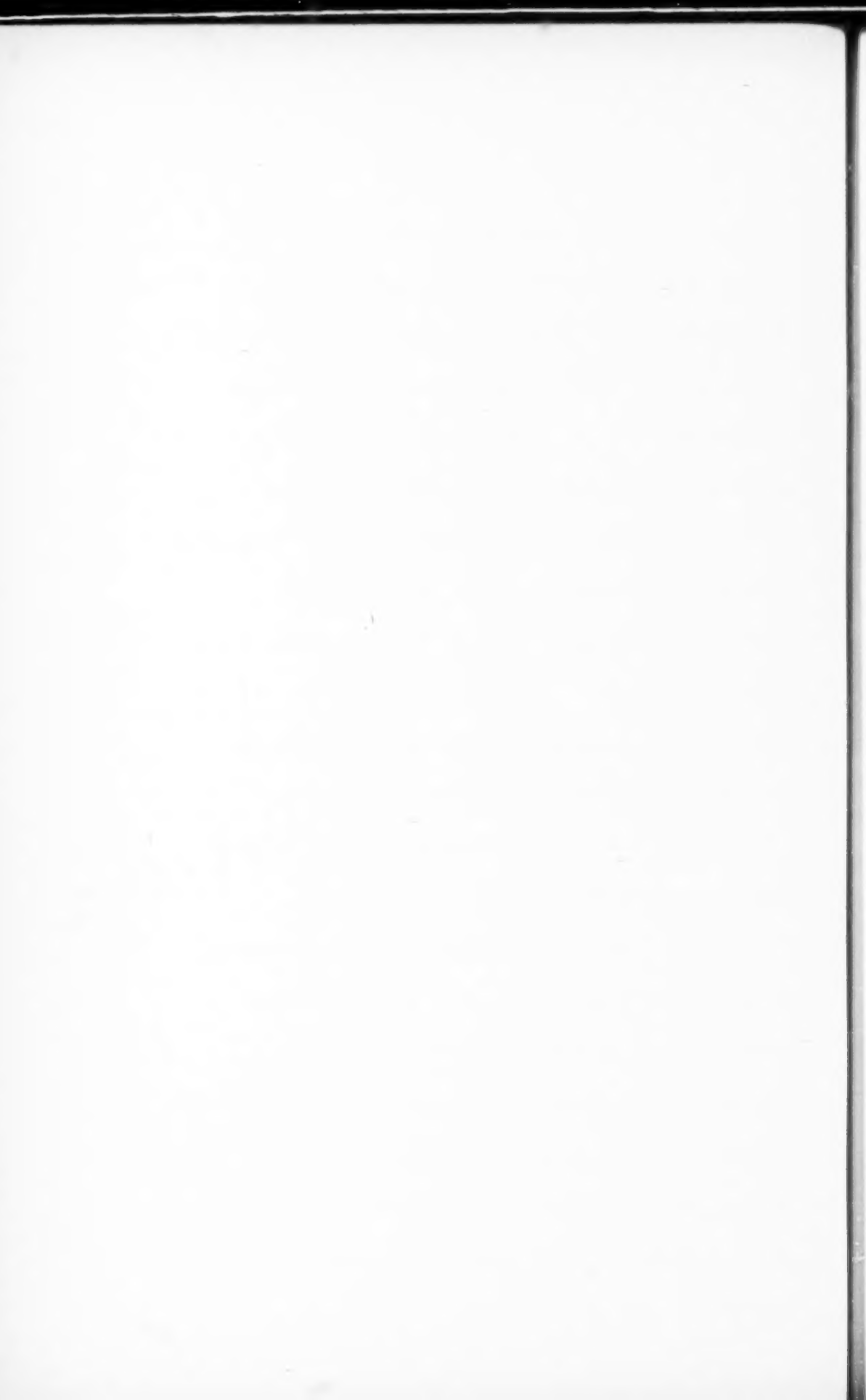


(3) Depositions of Robert Reed, dated December 13, 1972, December 20, 1972, January 12, 1972, February 8, 1973, March 9, 1973, and March 29, 1973, together with plaintiff's Exhibits 1 through 49;

(4) Depositions of Mid-Island Hospital dated October 25, 1973, Beatrice Potter, dated October 25, 1973, Sidney Hackell, dated October 25, 1973, and First National City Bank by Henry McKenzie, dated October 25, 1973;

(5) The affidavit of Robert Reed, dated March 13, 1974;

(6) Plaintiff's supplemental summons and amended and supplemental complaint, dated July 24, 1974, defendant's answers filed June 12, 1975 (Feinerman), June 6, 1975 (Soto, et al.), October 18, 1974 (Executors et al.); plaintiff's reply, dated November 1, 1974;



(7) Transcript of testimony with defendants' Exhibits 1 through 6, on motion for summary judgment, dated February 25, 1975 and February 26, 1975;

(8) Depositions of Sidney Hackell, dated May 2, 1977, May 3, 1977, May 4, 1977, May 27, 1977, June 15, 1977, and October 4, 1977, with plaintiff's Exhibits 50 through 62;

(9) Depositions of Sheldon Katz and Volume Feeding, dated May 6, 1977 and November 17, 1977, with plaintiff's Exhibit 63;

(10) Depositions of Judah Feinerman and Jasdane, Inc., dated May 16, 1977 and October 25, 1977;

(11) Depositions of Juan Soto and J.S.K. Cleaning Services, Inc., dated May 9, 1977 and November 28, 1977, with plaintiff's Exhibits 64 and 65;

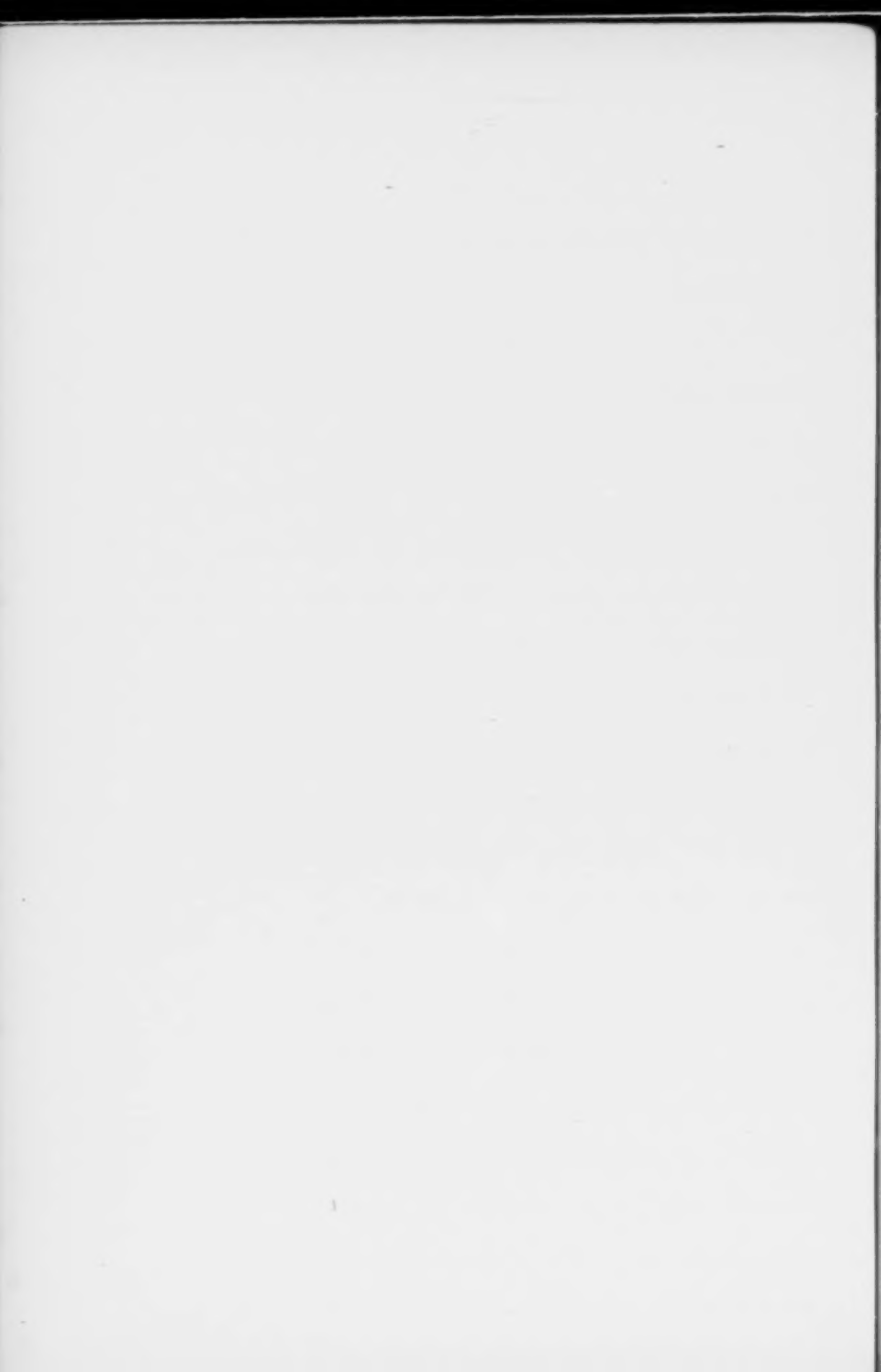
(12) Deposition of Brimsco, Inc., by Robert Reed, dated May 10,



1977, with Exhibits produced thereafter by Brimsco;

(13) Documents produced by defendants for discovery and inspection on April 18, 1978, April 21, 1978, May 3, 1978, and June 3, 1978, pursuant to court order dated April 4, 1978, and marked J.S.K. No. 1 and 2; Volume Feeding Nos. 1 through 6; Scream Nos. 1 through 5; Realty Nos. 1 through 4; Hospital Nos. 1 through 3; and Estate Nos. 1 through 42;

(14) Depositions of Robert Cohen, dated August 14, 1978, August 15, 1978, August 16, 1978, August 18, 1978, August 21, 1978, August 22, 1978, August 23, 1978, August 24, 1978, August 28, 1978, August 29, 1978 (two transcripts), August 30, 1978, August 31, 1978, September 14, 1978 (two transcripts), September 15, 1978, September 16, 1979,

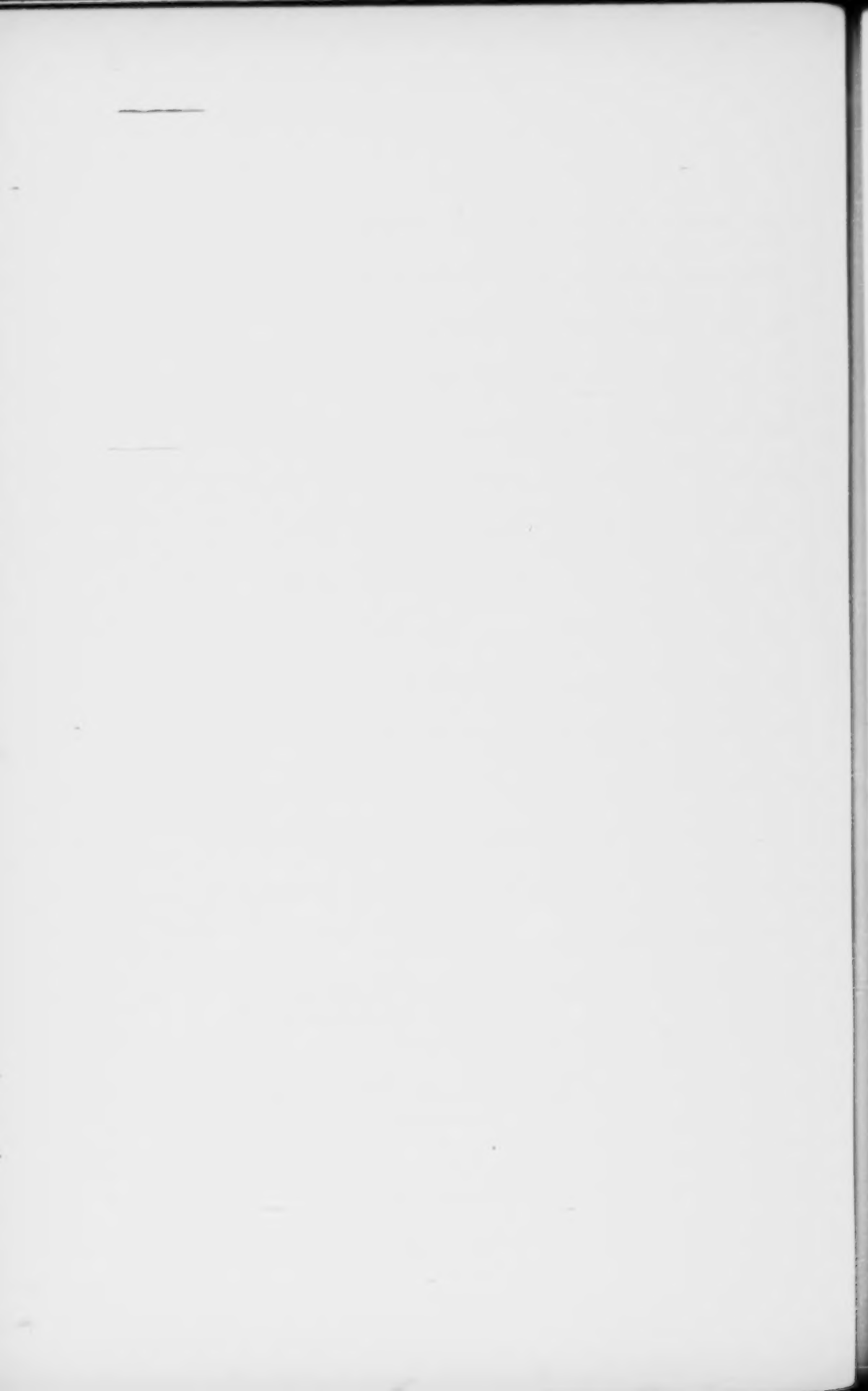


September 19, 1978, and September 20, 1978 (rulings), with defendants' Exhibits AAA through F11;

(15) Depositions of Stephen Hochhauser, dated January 8, 1979, January 11, 1979, January 16, 1979, January 17, 1979, January 19, 1979, January 24, 1979, January 25, 1979, January 29, 1979, January 30, 1979, January 31, 1979, February 2, 1979, February 3, 1979, with defendant's Exhibits G-11 through I-15;

(16) Affidavits submitted and read on the motion for summary judgment with Exhibits annexed:

- (a) Sidney Hackell, dated December 31, 1976;
- (b) Robert Reed, dated December 31, 1976;
- (c) Leon Goodman, dated December 3, 1976;
- (d) William B.F. Werner, dated December 28, 1976;



- (e) Robert Cohen, dated
September 26, 1975,
December 29, 1975,
March 14, 1979;
- (f) Arthur Press, dated
May 12, 1979;
- (g) Bernd Bildstein,
dated May 8, 1979;
- (h) Supplemental
affidavit of
Stephen Hochhauser,
dated April 4, 1979;
- (i) Second supplemental
affidavit of Robert
Cohen, dated
June 13, 1979;
- (j) Stephen Hochhauser,
dated June 19, 1979;
- (k) Additional affidavit
of Judah Feinerman,
dated June 18, 1979;
- (l) Sidney Hackell,
dated July 23, 1979;
- (m) Robert J. Reed,
dated July 23, 1979;
- (n) Melvin Schneider,
dated February 5,
1979;
- (o) Harry Oster, dated
June 29, 1979;



- (p) Beatrice Potter,
dated July 23, 1979;
- (q) Albert J. Fiorella,
dated July 23, 1979;
- (r) Sheldon Katz, dated
July 23, 1979;
- (s) Juan Soto, dated
July 23, 1979;
- (t) Elaine Wilschek,
dated July 23, 1979;
- (u) Howard S. Weisman,
dated July 23, 1979;
- (v) Stephen Hochhauser,
dated July 30, 1979;
- (w) Reply affidavit of
Sidney Hackell,
dated August 10,
1979.

(17) The plaintiff's Bill of
Particulars, dated September 3, 1975;

(18) Plaintiff's answers to
defendant's Interrogatories, dated
September 20, 1975;

(19) Plaintiff's amended and
Supplemental Bill of Particulars, dated
July 26, 1978;



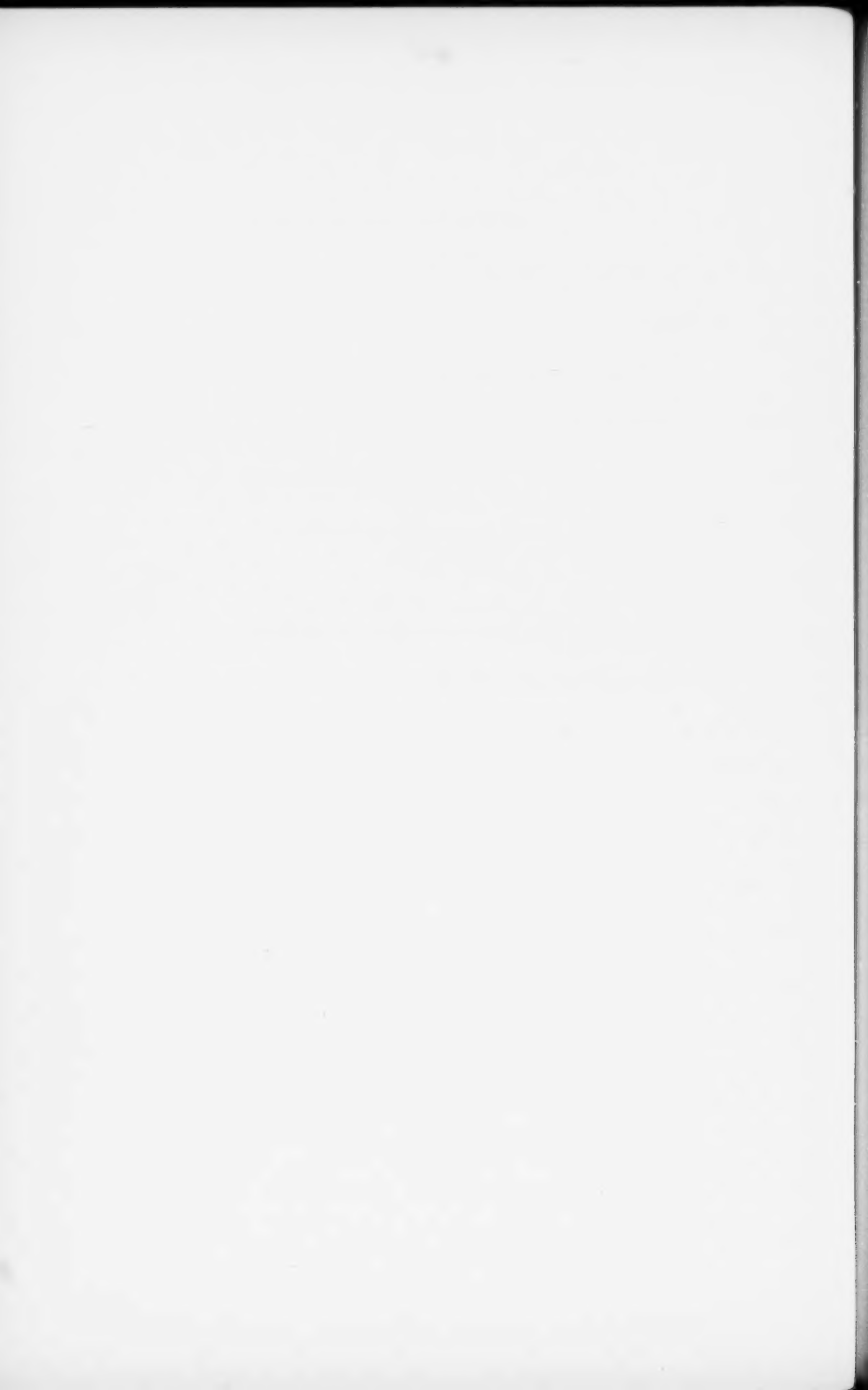
(20) Defendants' responses to Notice to Admit, dated December 5, 1978 (two sets);

(21) Transcripts of miscellaneous hearings at Surrogate's Court, Nassau County, dated September 7, 1977, August 10, 1977, and August 17, 1977.

(22) Copies of partnership agreements, minutes of Executor's meetings, contracts and leases filed by the parties with the court; and

upon motion of Albert J. Fiorella, attorney for defendants Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc., Sheldon Katz, and Volume Feeding, it is

ORDERED that the motion to reject the Referee's Report dated August 22, 1979 be and the same is hereby denied, and it is further



ORDERED that the said
Referee's Report be and the same is
hereby confirmed in all respects, and it
is further

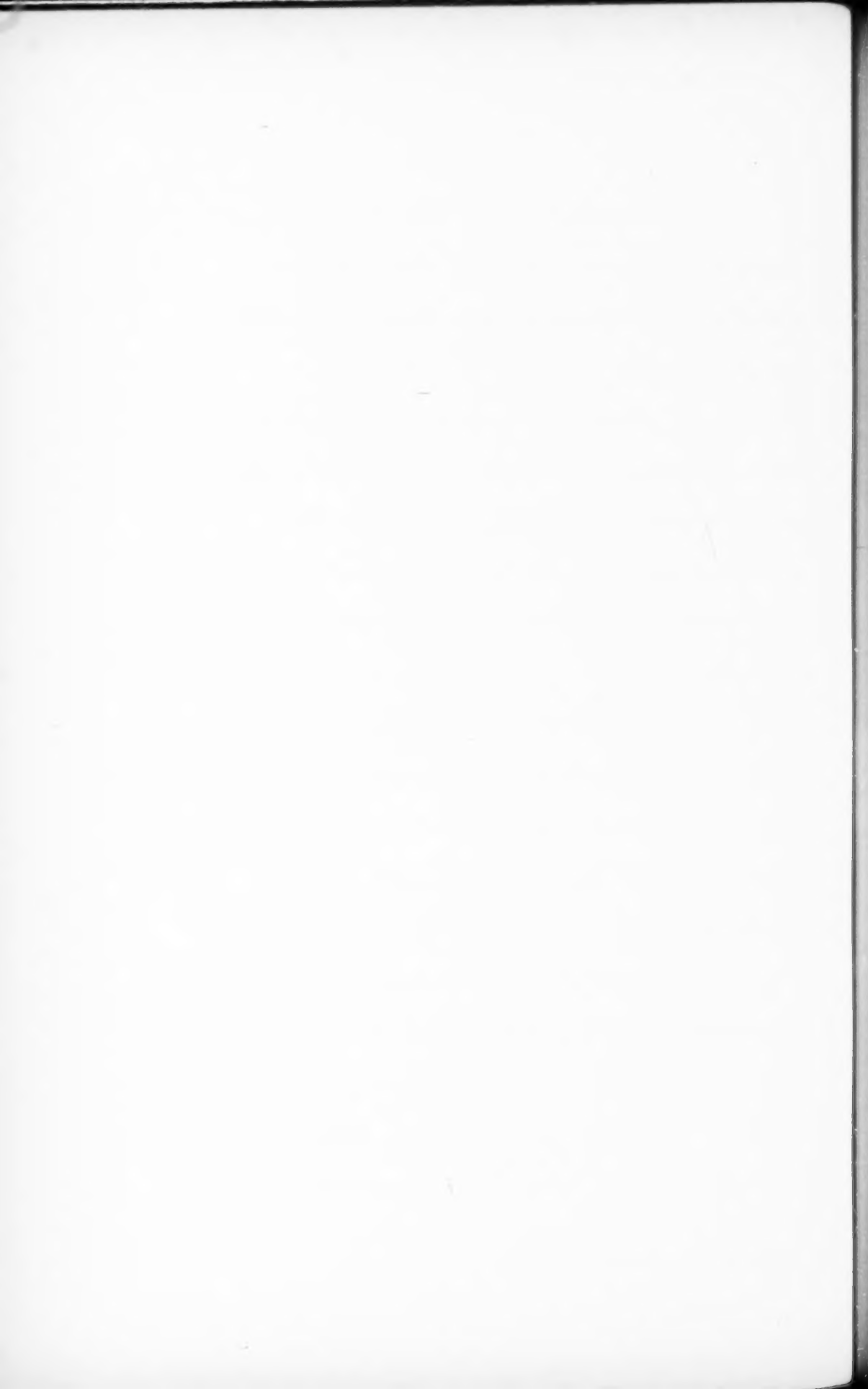
ORDERED that the First and
Third Causes of Action be and the same
are hereby dismissed, and that the
various motions of the defendants are in
all other respects denied; and it is
further

ORDERED that trial of the
issues be had before the Judge presiding
unless all parties consent to have the
referee hear and report, and it is
further

ORDERED that such trial shall
commence on or after March 4, 1980.

/s/ John D. Bennett
Judge of the
Surrogate's Court

[ENTERED January 28, 1980.]



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty: DECISION
Co., suing on behalf of :
himself and all other : File No. 148704
partners, both general :
and limited, and in the: Dec. 455
right and on behalf of :
Simon Cohen Real Estate:
& Management Co., Simon :
Cohen Realty Co., Simon:
Cohen Company, and :
Aljer Realty Co., :

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
Individually and as :
Executors of the Last :
Will and Testament of :
SIMON COHEN, deceased, :
WILLIAM B. F. WERNER, :
Individually and doing :
business as Mid-Island :
Hospital, JUAN SOTO, :
ELAINE WILSCHEK, J.S.K.:
CLEANING SERVICES, :
INC., JUDAH FEINERMAN, :
JASDANE, INC., SHELDON :
KATZ, VOLUME FEEDING, :
INC., DADGAB, INC., :
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &
MANAGEMENT CO., SIMON :
COHEN REALTY CO., and
ALJER CO., :

Defendants. :

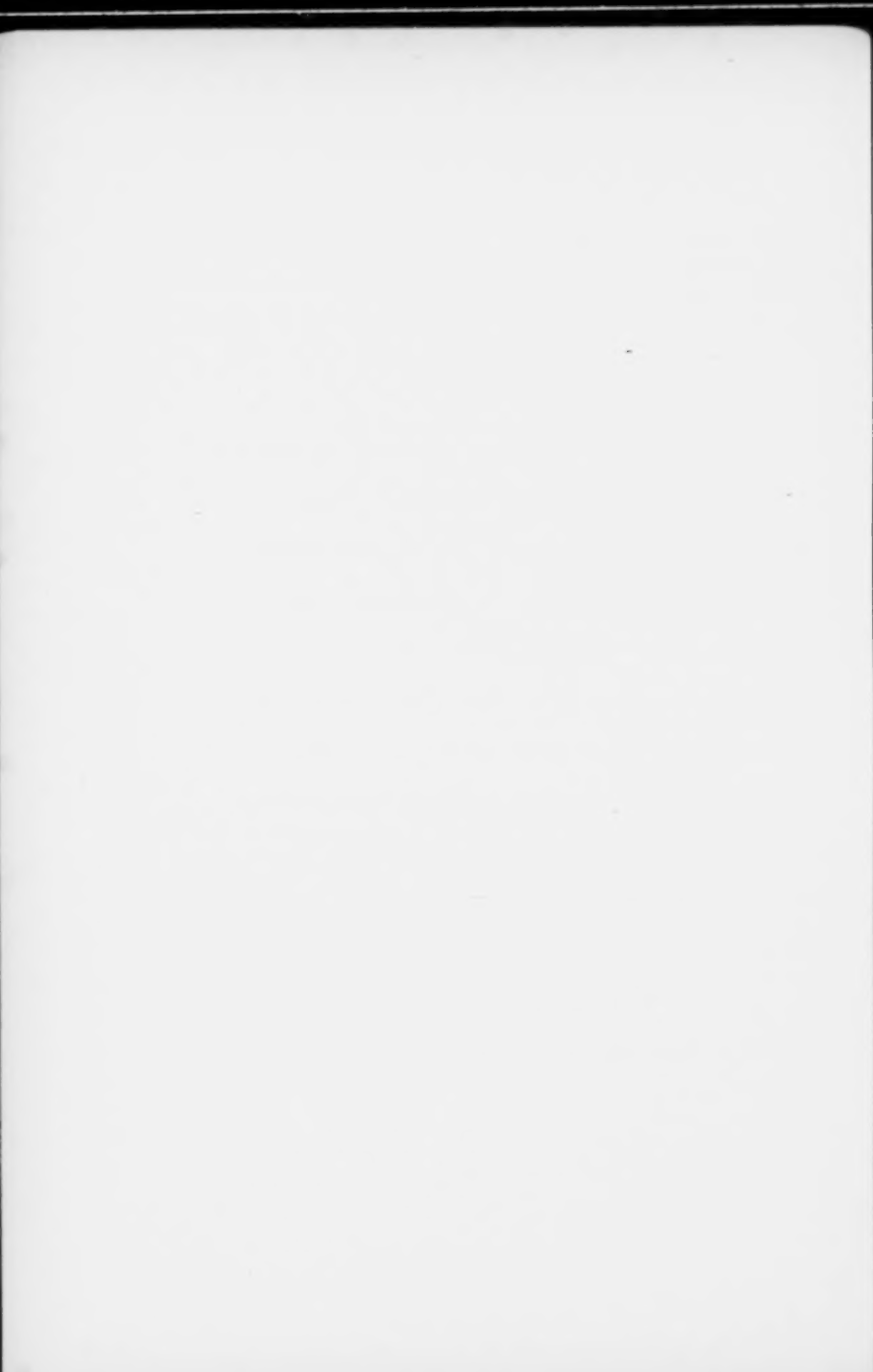
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This court settled an order on January 11, 1980, but we have also now received correspondence from the firm of Speno, Goldberg, Moore, Margules and Corcoran requesting that the order be once again resettled for the reason set forth in their correspondence. The court finds that the request has merit, and accordingly, the new order submitted will be signed if found to be in proper form.

Proceed accordingly.

Dated: January 28, 1980

JOHN D. BENNETT
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :
ually and as a Partner :
of Simon Cohen Real :
Estate & Management :
Co., Simon Cohen Realty: :
Co., Simon Cohen :
Company and Aljer : DECISION
Realty Co., suing :
on behalf of himself : File No. 148704
and all other :
partners, both general : Dec. 308
and limited, and in the :
right and on behalf of :
Simon Cohen Real Estate :
& Management Co., Simon: :
Cohen Realty Co., Simon :
Cohen Company and :
Aljer Realty Co.,

Plaintiff, :

- against - :

ROBERT J. REED, SIDNEY :
HACKELL, BEATRICE :
POTTER, and THE FIRST :
NATIONAL CITY BANK, :
Individually and as :
Executors of the Last :
Will and Testament of :
Simon Cohen, deceased, :
William B.F. Werner, :
Individually and doing :
business as Mid Island :
Hospital, JUAN SOTO, :
ELAINE WILSCHEK, J.S.K.: :
CLEANING SERVICES, :
INC., JUDAH FEINERMAN, :
JASDANE, INC., DADGAB,

INC., BRIMSCO, INC., :
SIMON COHEN REAL
ESTATE & MANAGEMENT :
CO., SIMON COHEN
REALTY CO., and :
ALJER REALTY CO., :

Defendants.

-----X

In this proceeding by Robert Cohen individually and on behalf of various partnerships against the executors of his father's estate, the defendants Juan Soto, Elain Wilschek, and J.S.K. Cleaning Services, Inc. seek to examine the records of an expert witness, Bernd Bildstein. The plaintiff opposes the application.

The plaintiff has submitted the witness's records for in camera review. Basically, the records consist of the following: 1) billing records; 2) documents relating to the expert's retainer agreement with the plaintiff; 3) research in connection with accounting standards and practices,



about which the expert testified; and
4) personal notes prepared by the
witness in connection with affidavits
submitted in this proceeding.

The items relating to the
retainer agreement or billing
arrangements with the plaintiff are
irrelevant to the issues in this
proceeding.

The items which are in
evidence or marked for identification in
this proceeding or in pre-trial
discovery proceedings, or otherwise on
file with the court, are available to
the defendants and are therefore not a
proper subject for the instant
application (Kent v. Maryland Cas. Co.,
25 AD2d 653).

The witness's research notes
and notes made in preparation of
affidavits submitted to the court are
material prepared for litigation and



therefore not discoverable (Seaview Chief Inc. v. Transamerica Ins. Co., 61 AD2d 1043; Penn Plaza Venture v. Glens Fall's Ins. Co., 32 AD2d 768; Parker v. New York Tel. Co., 24 AD2d 1067; CPLR 3101 subd. [d][1]). The defendants have not established that the materials fall within the exception set forth in subdivision [d] of CPLR 3101.

The application is therefore denied. In order to preserve the records for appeal they will be photocopied at the expense of the defendants seeking discovery.

Dated: November 12, 1981

C. RAYMOND RADIGAN
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File 148704
ually and as a partner
of Simon Cohen Real : Dec. 862
Estate Co., etc.,

: DECISION
Plaintiff,

- against -

ROBERT J. REED, et al.,
Defendants.

Estate of SIMON COHEN,
Application to Fix :
Attorneys' Fees under :
SCPA 2110. :

-----X

This proceeding, which was transferred to this court from the Supreme Court, Nassau County, is one in which the decendent's son, individually and as a partner on behalf of certain partnerships, alleges that the decedent and certain defendants were parties to a conspiracy to siphon monies from the



Mid-Island Hospital, Bethpage, New York, thereby reducing the profits of a partnership known as Simon Cohen Real Estate and Management Company (SCREAM). The plaintiff also alleges other attempts to misappropriate funds from the partnerships by partners and other individuals. Additional allegations contained in the fifteen causes of action which survived a motion for summary judgment and dismissal need not be explored for the purpose of this decision.

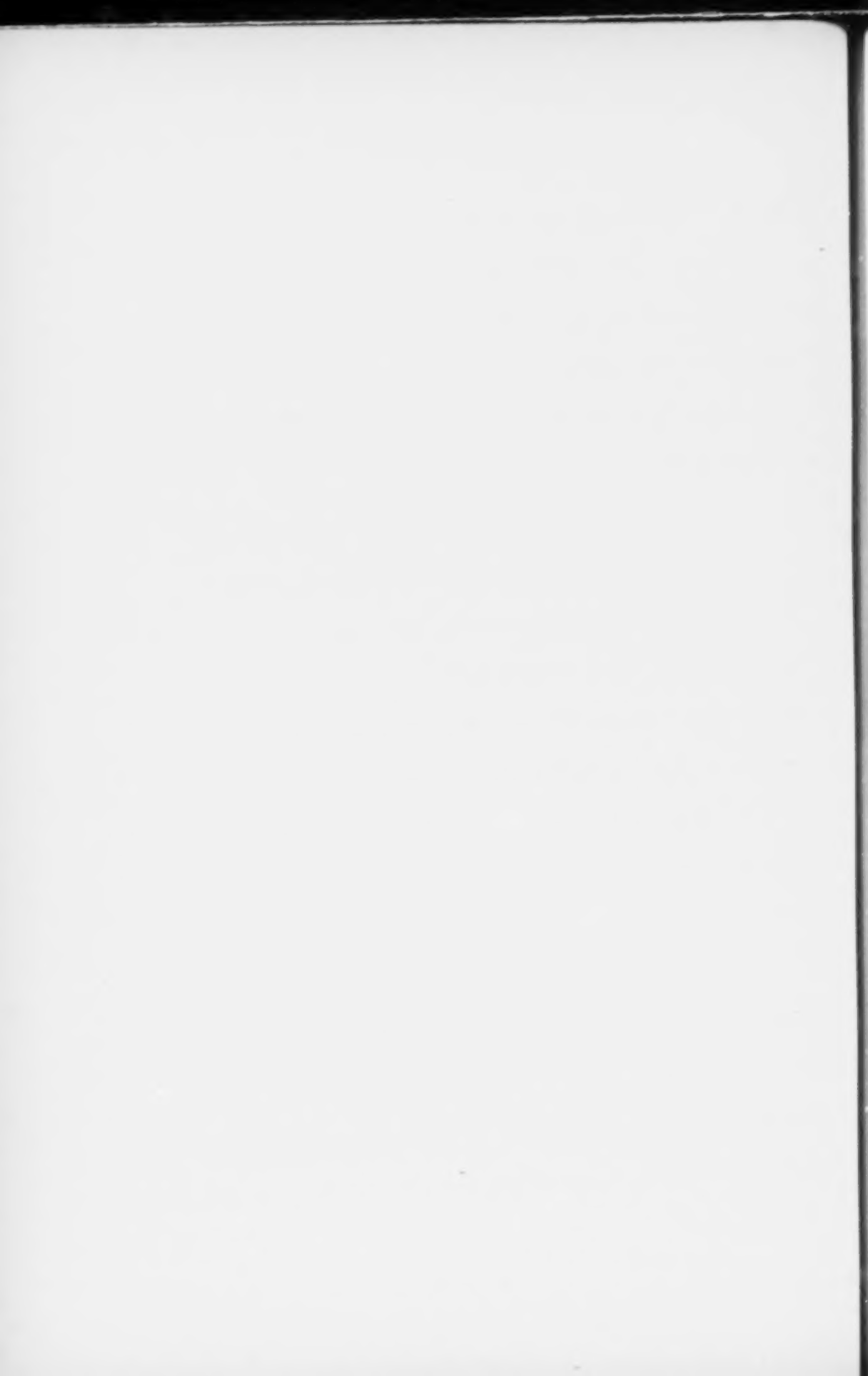
By order to show cause the plaintiff, Robert Cohen, has applied for an order pursuant to CPLR 321 directing that Mr. Hochhauser be relieved as attorney for the plaintiff, determining his fee, determining the fee of a former attorney, Mr. Shannon, and directing



both attorneys to turn over certain records. Mr. Hochhauser has made a cross-motion for advice and direction and for an order fixing his fee. Mr. Shannon has made a cross-motion for an order fixing his fee.

The plaintiff states in his affidavit that he is dissatisfied with the services rendered by Mr. Hochhauser generally, and particularly with the position taken by Mr. Hochhauser with respect to certain settlement proposals. The plaintiff takes the position that he has an absolute right to discharge his attorney.

Mr. Hochhauser has applied to the court for advice and direction stating that it is his position that Mr. Cohen cannot properly represent the other partners because he is in a



conflict of interest. Mr. Hochhauser states that certain settlement proposals are in the best interests of the partnerships but that these proposals have been rejected by Mr. Cohen because of his desire to oust Mr. Reed (an executor of the estate, general partner of SCREAM, and executive director of the hospital) from a position of control in the Mid-Island Hospital. Mr. Hochhauser states that Mr. Cohen's objections to a settlement are motivated by a personal animosity towards Mr. Reed. Mr. Cohen concedes that he finds the settlement proposals unacceptable in part because they do not provide for the removal of Mr. Reed.

To date, the record in this proceeding comprises more than 5,500 pages and at the time of the instant



motion the plaintiff was a few days short of resting his case, which has taken over fifty days to try to date.

On the motion for summary judgment and to dismiss the complaint the defendants raised questions concerning Mr. Cohen's status to commence an action on behalf of the limited or general partners of some of the partnerships. In a referee's report (August 22, 1979) which was confirmed by the court in a decision dated November 28, 1979 it was determined that Mr. Cohen's status vis a vis SCREAM could not be determined on a motion for summary judgment, but that the complaint would be construed liberally as an allegation by Mr. Cohen that he was a general partner and in the alternative that he was a limited partner of SCREAM.



The fact that the plaintiff states in his complaint that the causes of action numbered "One" through "Sixteenth" are brought pursuant to Section 115a of the Partnership Law is sufficient to bring these causes of action with the general procedural rules which normally govern derivative actions, for the purpose of this motion.

As a general rule, a client has the right to discharge his attorney at any time and for any reasons which to him seem satisfactory (*Matter of Dunn*, 205 NY 398; *Kertatos v. Ferreri*, 17 Misc.2d 617) subject to any retaining (*Griffing v. Kearns*, 285 App.Div. 952; Judiciary Law Section 475) or charging lien which the attorney may have.

It has been observed, however, that in derivative and class actions the



traditional roles of attorney and client may to some extent be inapplicable (see, Developments in the Law, Class Actions, 89 Harv. L. Rev. 1318).

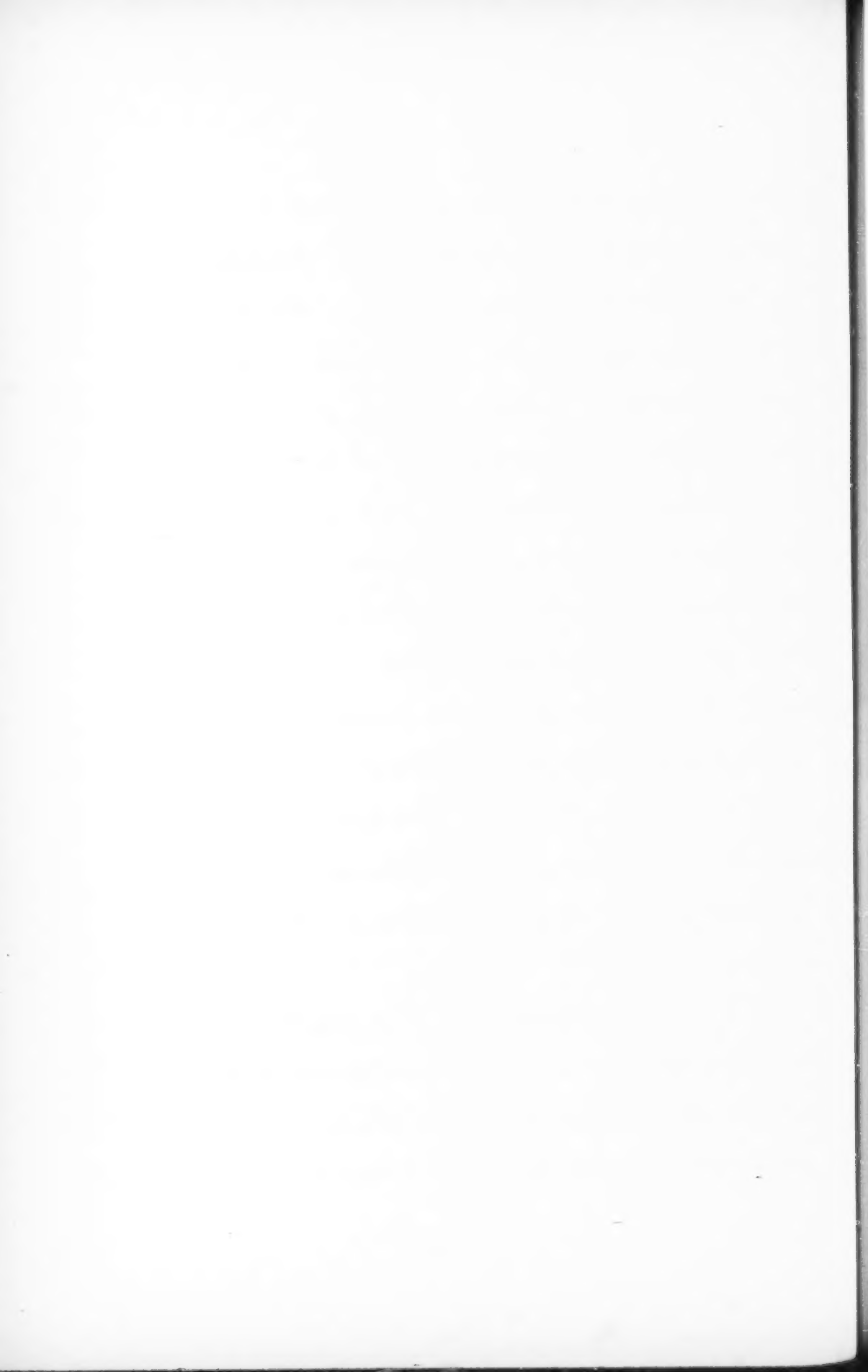
A derivative suit is brought by the nominal plaintiff in the name of the corporation or partnership. The corporation or partnership is the real party in interest. The plaintiff is merely an instigator (*Carruthers v. Waite Mining Co.*, 306 NY 136). He has been likened to a guardian ad litem (*Denicke v. Anglo California Nat. Bank*, 141 F.2d 285 cert. denied 323 U.S. 739).

It has been held that an attorney in a class action may not look to the nominal plaintiff as his exclusive client. Where a potential conflict arises, he has a duty to point out the conflict to the court so that



appropriate steps can be taken to protect the other stockholders (Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 cert. denied 439 U.S. 1115). The same principle would apply in a derivative action pursuant to Section 115a where the other partners may be unaware of potential conflicts. The potential for abuse or inadequate representation in derivative suits is well recognized (Haudeck, The Settlement and Dismissal of Stockholders' Actions, Part II, 23 S.W.L.J. 772; McLaughlin, Capacity of Plaintiff Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421).

The allegation of a conflict of interest is sufficient to bring this matter within the scope of the court's power to conduct an inquiry where it



appears that the interests of absent partners may be jeopardized. If in fact the plaintiff's actions are motivated by personal animosity towards Mr. Reed he is in as much of a conflict as a representative plaintiff who has an adverse pecuniary interest (see, *Norman v. Arcs Equities Corp.*, 73 F.R.D. 502).

Additionally, it is noted that there is authority for the proposition that a nominal plaintiff does not have the power to substitute counsel over the objections of those he represents (*Scott v. Donhaue*, 269 P. 774).

Moreover, one of the primary reasons for substitution of attorneys in this case appears to be a disagreement over settlement proposals. The final decision as to the acceptability of a compromise of a derivative suit brought



by a limited partner is with the court (Partnership Law 115a subd. [4]), which must approve any compromise.

While a representative plaintiff has a duty to prosecute an action vigorously (Doglow v. Anderson, 43 F.R.D. 472), he has a concomitant duty to use wise judgment in negotiating a fair and reasonable settlement (Norman v. Arcs Equities Corp., supra).

In a derivative suit, a compromise will rarely be approved without the consent of the nominal plaintiff (Saylor v. Lindsley, 456 F.2d 896). However, the Court has the power to impose a settlement over his objection (Flinn v. FMC Corp., 528 F.2d 1169 cert. denied 424 U.S. 967; Purcell



v. Keane, 54 F.R.D. 455; see also, Saylor v. Lindsley, supra).

The court therefore finds that the limited and general partners of the various partnerships should be apprised of (1) the status of negotiations in this matter; (2) the application for an order substituting counsel; and (3) questions raised as to a possible conflict of interest.

A hearing will be conducted on October 4, 1982 to determine whether an order should be made substituting Schoeman, Marsh, Updike & Welt as plaintiffs' attorney, whether Mr. Cohen is in a conflict of interest, and if so, what corrective steps are to be taken. Notice to the limited and general partners of Simon Cohen Real Estate and Management Company, Simon Cohen Realty



Company, Aljer Realty Company and Simon Cohen Company shall be made by mailing a copy of this decision and the Notice of Hearing appended to this decision within ten (10) days of the order following the decision. The plaintiff is to bear the cost and responsibility of notification. The names of those to receive said notice are to be supplied to the plaintiff by Mr. Reed and his attorneys.

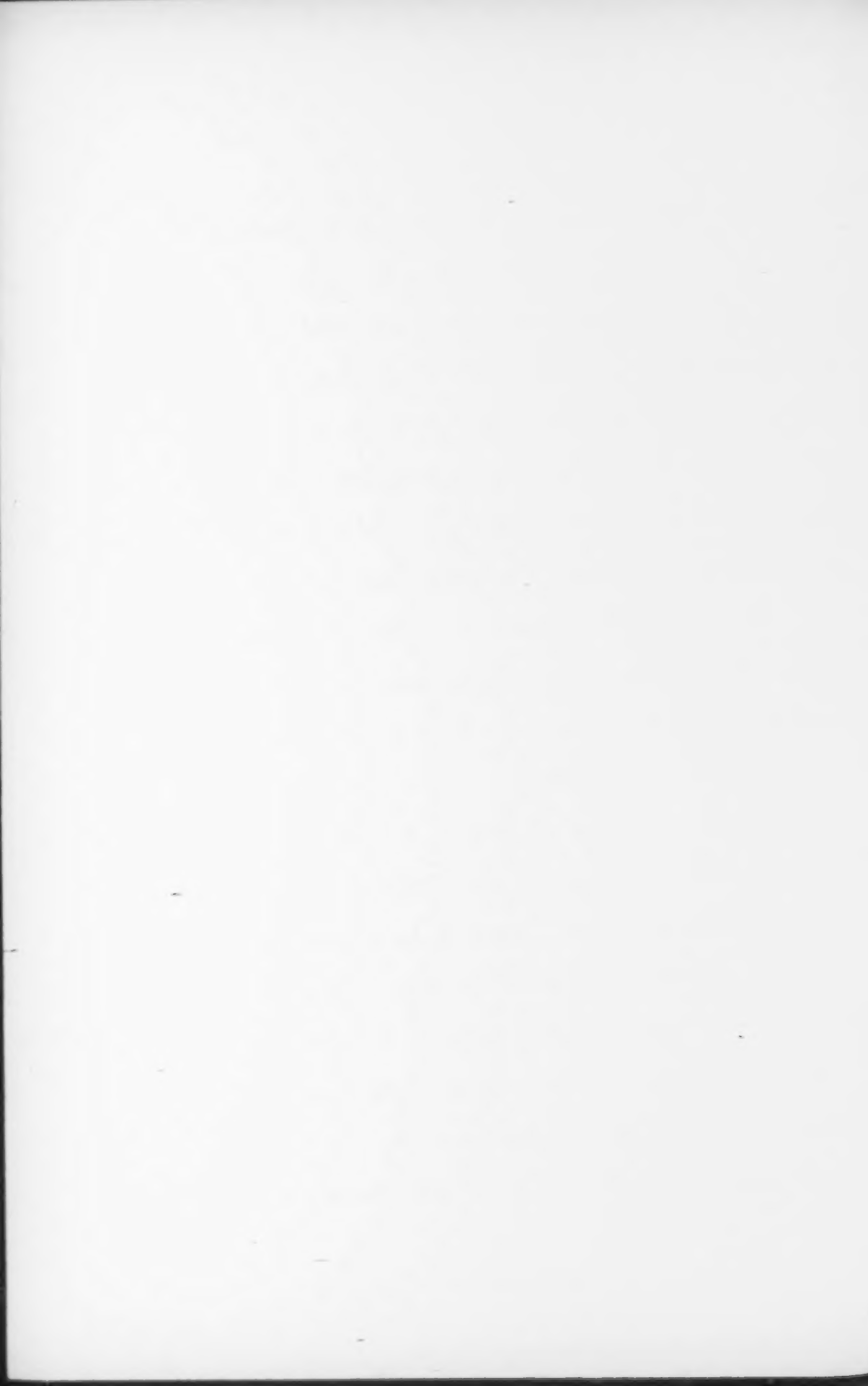
The question of attorneys' fees will be held in abeyance pending determination of the above.

A question has been raised concerning the appropriateness of a motion pursuant to CPLR in this court. Mr. Shannon has moved for an order directing the plaintiff to seek relief by way of a motion pursuant to section

2110 of the Surrogate's Court Procedure Act.

However, since payment of attorney's fees is sought from Robert Cohen individually, and not from the estate, or his share of the estate, the application is not a proper subject of a proceeding pursuant to SCPA 2110.

The lien sought to be enforced is a retaining lien which, unlike the statutory charging lien from which 2110 is derived, is a common law lien which is confined to the property in the possession of an attorney (Matter of Cooper, 291 NY 255). There is no basis for the conclusion that this court is without jurisdiction to fix a retaining lien incidental to a motion pursuant to CPLR 321 (1A Warrens Heaton on Surrogates' Court, Section 47, para. 3),



and clearly the question of attorneys' fees is one which should be resolved in the forum in which the action is pending and which is most familiar with the facts and circumstances of an extremely complex case.

An additional jurisdictional question not raised as yet involves the court's authority to determine the merits involved in the many different types of complaints which have been transferred to this court by the Supreme Court.

The jurisdiction of the Surrogate's Court has gradually expanded to include many causes of action over which the Supreme Court has concurrent jurisdiction (Matter of Brandt, 81 AD2d 268; Matter of Finkle, 90 Misc.2d 550 aff'd 59 AD2d 862; Matter of Breitman,



450 NYS2d 985). Whenever possible all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court (Peekskill Community Hospital v. Sayres, 450 NYS2d 527).

However, the recent case of Piccione (85 AD2d 604 and 85 AD2d 605) has caused concern regarding the extent of jurisdiction of this court (see Matter of Leichter, NYLJ 1/6/81 [Nassau Co.]; see also, Wyath v. Fulrath, 13 AD2d 250; Matter of Lainez, 79 AD2d 78 aff'd 55 NY2d 657). The Piccione case is presently on appeal to the Court of Appeals and will not be decided until the fall.

The court is of the opinion that it has subject matter jurisdiction of this proceeding (N.Y. Const. Art. 6,

Section 12 subd. [d]). In addition to the specific jurisdiction of the Surrogates set forth in the State Constitution, the Constitution provides that the legislature may confer additional jurisdiction to the Surrogate's Court (N.Y. Constitution, Article 6, Section 12[d]), and the legislature has so provided by having the Supreme Court transfer matters to this court and give this court jurisdiction of the Supreme Court derivatively (SCPA 5011[b]; CPLR 325[e]; Matter of Suchoff, 55 Misc.2d 284). However, after consultation with this county's Administrative Judge it has concluded that too much time has been expended in this matter to have a determination made by the court placed in jeopardy for lack of jurisdiction,

and it therefore may be safer for this action to be determined by the Supreme Court until the jurisdictional issue is decided by the Court of Appeals or resolved by legislation.

Therefore, if the attorneys consent on behalf of their clients, the Surrogate, as Acting Supreme Court Justice, will approve the re-transfer of this action to the Supreme Court, Nassau County (see *Huston v. Rao*, 74 Misc.2d 127) to be tried by him as Acting Supreme Court Justice, with the understanding that the transcript of the hearing to date and all that has been admitted into evidence will be deemed to have taken place before the Acting Supreme Court Justice.

A155

Settle order on five days'
notice, with three additional days if
service is made by mail.

Dated: August 2, 1982

C. RAYMOND RADIGAN
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : NOTICE OF
ually and as a partner : HEARING
of Simon Cohen Real :
Estate Co., Inc., : File 148704
Plaintiff, :
- against - :

ROBERT J. REED, et al., :
Defendants. :

ESTATE OF SIMON COHEN :
-----X

NOTICE OF HEARING

This proceeding commenced by
Robert Cohen, individually and on behalf
of certain partnerships, having been
transferred from the Supreme Court,
Nassau County, is now pending in the
Surrogate's Court, Nassau County.



DESCRIPTION OF LITIGATION

The amended and supplemental complaint alleges seventeen causes of action, sixteen of which are brought derivatively on behalf of the following partnerships: Simon Cohen Real Estate and Management Company (SCREAM); Simon Cohen Company (SCC); Simon Cohen Realty Company (SCR); and Aljer Realty Company (Aljer). The defendants are the various partnerships; the executors of the estate of Simon Cohen individually and in their fiduciary capacities as executors, and in some cases as general partners in the various partnerships; William B. F. Werner; Mid-Island Hospital (M-I-H); Juan Soto; Elaine Wilschek; Sheldon Katz; Judah Feinerman; J. S. K. Cleaning Services, Inc.,



Jasdane, Inc.; Volume Feeding, Inc.;
DADGAB, Inc; and Brimsco, Inc.

The following is a general summary of the causes of action and is not intended to be all-inclusive.

The first cause of action concerns a sublease between M-I-H and SCREAM and alleges that the negotiations between M-I-H and SCREAM for a sublease which allegedly provided that SCREAM would be entitled to 100% of the rents and profits of M-I-H inadvertently omitted a provision which would have provided for inspection of M-I-H's books and records. A reformation of the sublease is sought. The second cause of action brought on behalf of SCREAM alleges that the omission with respect to the inspection and audit was a product of fraud. The third cause of



action is a claim that the sublease impliedly gives a right of inspection and audit.

The fourth cause of action on behalf of SCR alleges that Simon Cohen made unauthorized withdrawals from SCR. The fifth cause of action alleges that Reed, Hackell, Potter, Citibank and Werner-M-I-H aided and abetted Simon Cohen in carrying out and concealing the wrongful withdrawals.

The sixth cause of action concerns the alleged failure of the executors to inform the SCR partners of the alleged wrongdoing.

The seventh cause of action brought on behalf of SCREAM alleges that Simon Cohen made wrongful withdrawals from SCREAM for his personal use. The eight cause of action concerns alleged



wrongful acts by Reed in connection with repayment of alleged loans from SCREAM to Simon Cohen. The ninth cause of action alleges that Simon Cohen, with Reed's assistance, permitted Werner-M-I-H to enter into contracts with various businesses as a result of which Werner-M-I-H paid substantially greater sums for services which had previously been performed by its employees and that this resulted in a loss of revenues to SCREAM. The tenth cause of action alleges that some of the defendants knew and participated in the alleged scheme to defraud SCREAM. The eleventh cause of action alleges that Reed wasted the assets of SCREAM.

The twelfth cause of action alleges that Reed wasted the assets and mismanaged SCR.

The thirteenth cause of action alleges that Reed wasted the assets and mismanaged SCC. The fourteenth cause of action alleges that Reed breached his fiduciary duty to SCC by diverting business opportunities and income. The fifteenth cause of action alleges that Simon Cohen engaged in self-dealing in connection with SCC.

The sixteenth cause of action alleges that Reed has wasted the assets and mismanaged the business of Aljer.

The seventeenth cause of action is brought by Robert Cohen individually and alleges that Robert Reed wrongfully filed an amendment to a partnership agreement which provided for Robert Cohen's resignation as a general partner.



HISTORY OF LITIGATION

The original complaint in this action was served in 1971. An amended and supplemental complaint was served in August, 1974. The defendants moved for an order dismissing each cause of action and an order granting summary judgment. The court reserved decision to allow the parties to exhaust all discovery devices. Following the completion of discovery reargument of the motion for summary judgment was made before the Hon. C. Raymond Radigan as Referee. In a report dated August 22, 1979 he recommended that the motion for an order granting summary judgment be denied and the motion for an order dismissing the first and third causes of action be granted and that the motion for an order dismissing each of the remaining causes

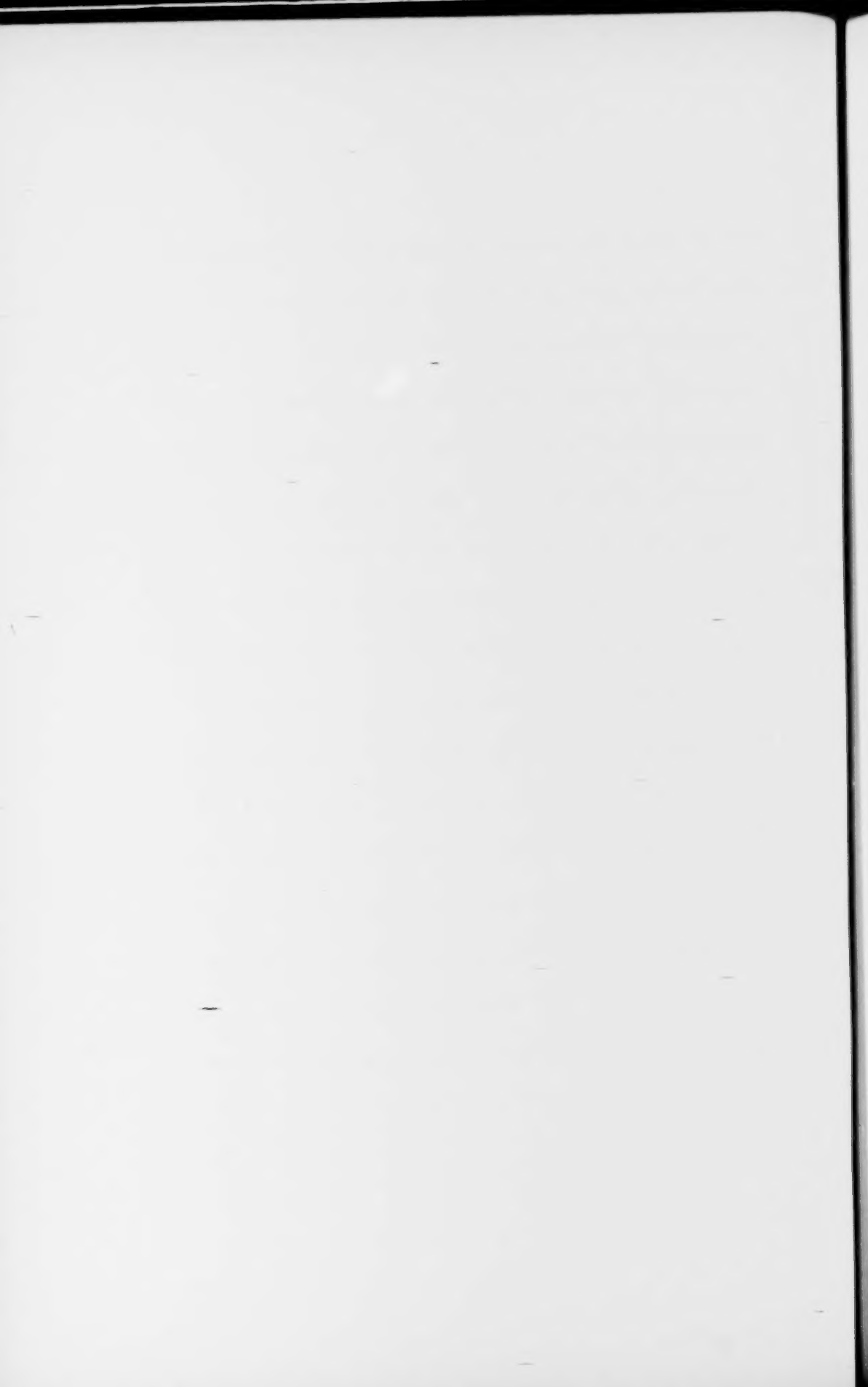


of action be denied. The report was confirmed by Surrogate Bennett in a decision dated November 28, 1979.

The trial commenced before the Hon. C. Raymond Radigan as Referee. Thereafter, the parties consented to have the case continue before him as Surrogate of Nassau County. Currently, more than fifty days have been occupied at trial. Towards the end of the plaintiff's case the plaintiff, Robert Cohen, filed a motion requesting that Mr. Hochhauser be discharged as plaintiff's attorney, that his fee be determined and that he be required to turn over books and records in his possession. Mr. Hochhauser made a cross-motion for advice and direction stating that Mr. Cohen has obstructed settlement negotiations because he was



motivated by personal animosity towards Mr. Reed and would not accept any proposal which did not provide for the removal of Mr. Reed as executive director of M-I-H. Mr. Hochhauser further states that Mr. Cohen is in a conflict of interest as nominal plaintiff in the derivative suits. In its decision dated July 30, 1982 which is attached to this Notice, the court determined that the limited and general partners of Aljer, SCREAM, SCC and SCR should be apprised of (1) the status of the negotiations in this matter; (2) the application for an order substituting counsel; and (3) the question raised as to a possible conflict of interest.



NOTICE OF HEARING

A hearing will be conducted on October 4, 1982 at 9:30 a.m. in connection with the above at the Nassau County Surrogate's Court, 262 Old Country Road, Mineola, New York. Anyone who wishes to be heard on this matter should appear in person or by counsel at that time. If the trial on the outstanding causes of action is to continue the court will make a further order, after the hearing herein provided is completed, concerning if the Surrogate will continue the trial or if he will continue the trial as an Acting Supreme Court Justice as provided for in the decision to which this notice is attached.

Dated: August 2, 1982



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File 148704
ually and as a partner
of Simon Cohen Real : Dec. 862
Estate and Management
Co., :

Plaintiff, : ORDER WITH
NOTICE OF
SETTLEMENT

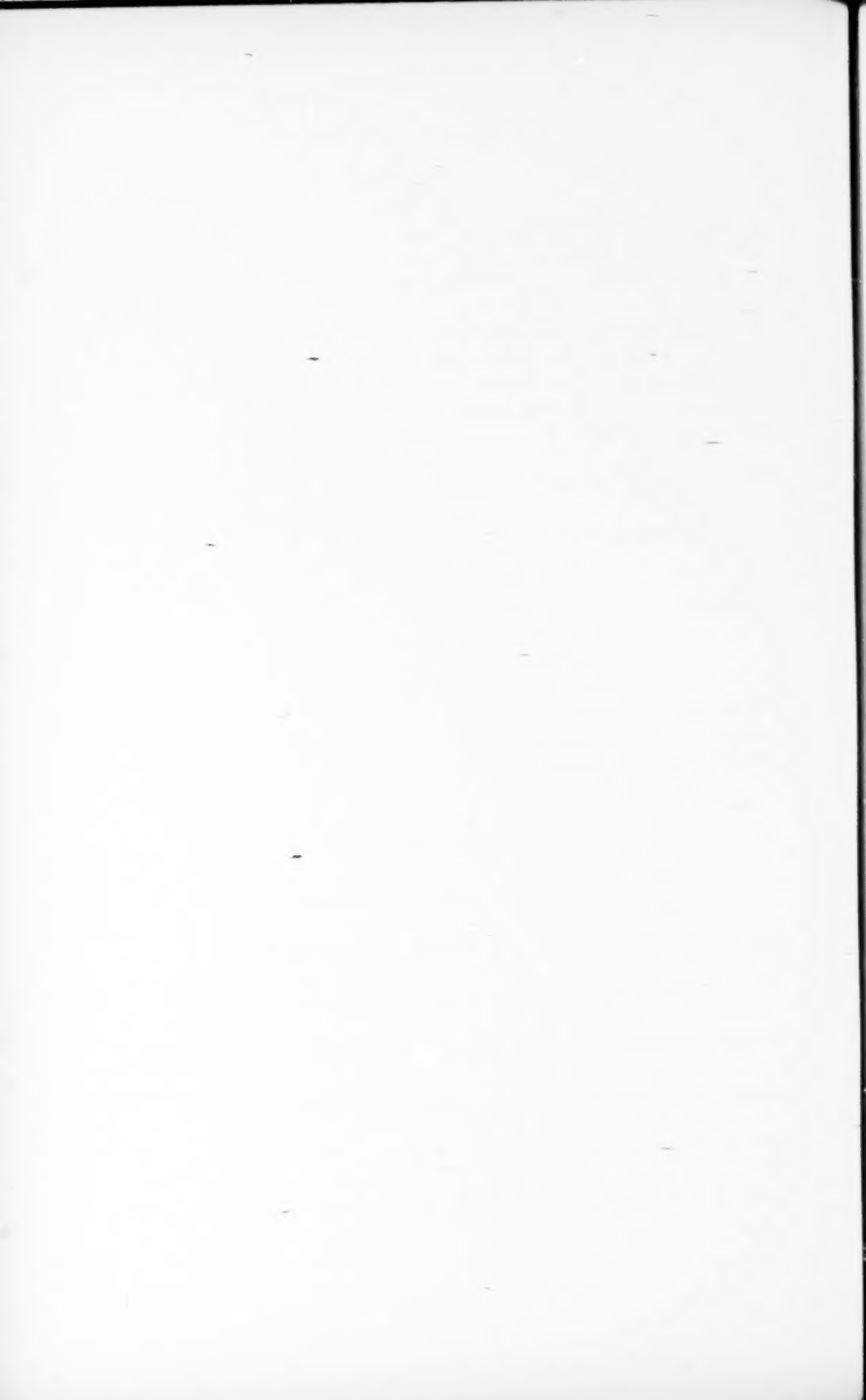
- against - :

ROBERT J. REED, et al, :
Defendants. :

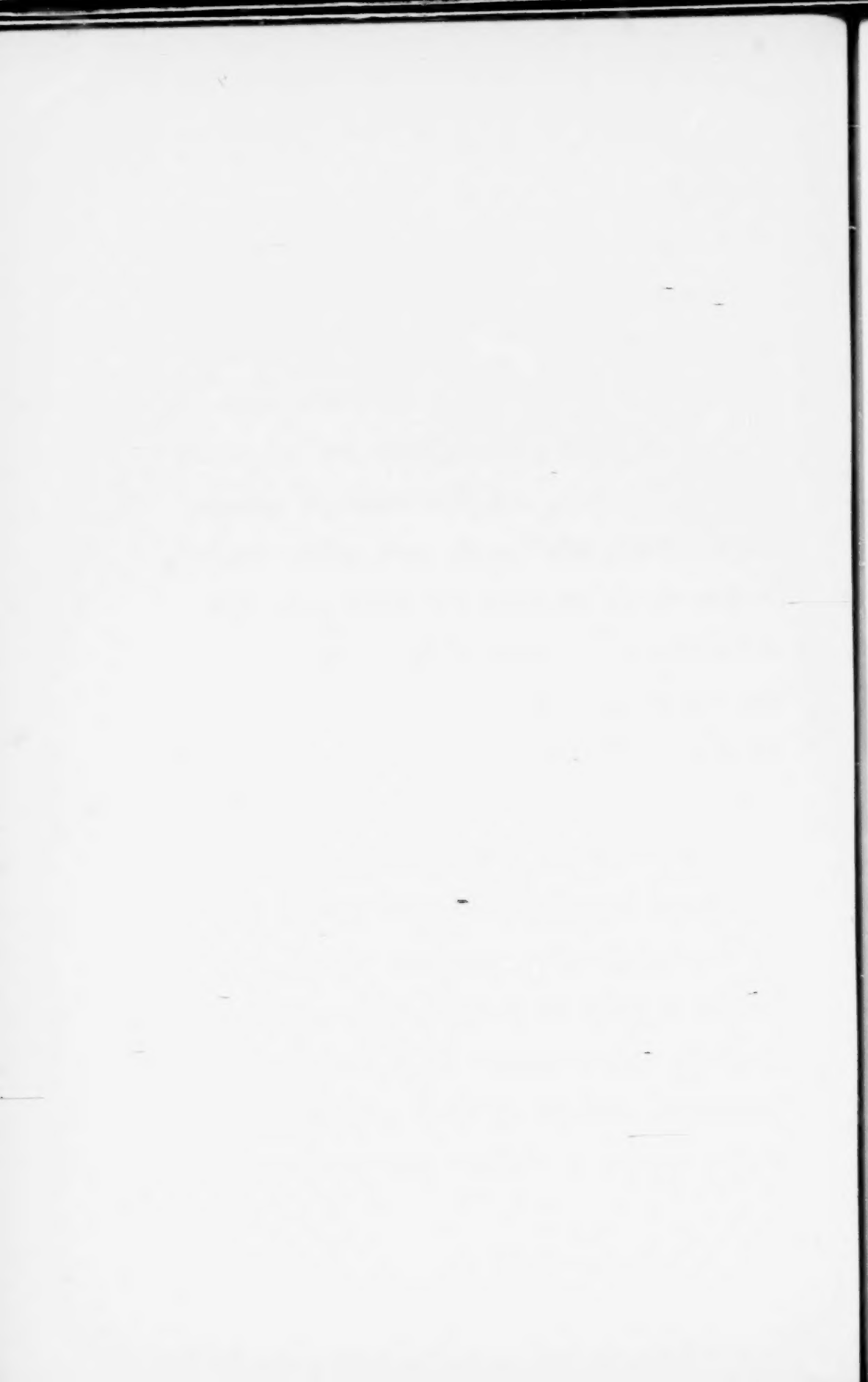
Estate of SIMON COHEN, :
Application to Fix :
Attorneys' Fees under :
SCPA 2110 :

-----X

Plaintiff, Robert Cohen,
having moved for an order pursuant to
CPLR 321, directing that his attorney,
Stephen Hochhauser, be relieved,
determining his fee, determining the fee
of a former attorney, Robert V. Shannon,
and directing both attorneys to turn



over certain records, and said Stephen Hochhauser, having cross moved for advice and direction and for an order fixing his fee, and said Robert V. Shannon having cross moved for an order fixing his fee, and the matters having come before the Court, and after hearing argument of counsel and reviewing the affidavits and memoranda of law submitted by the various parties, having rendered a decision, dated August 2, 1982, directing the holding of a hearing on notice to all interested parties to determine whether an order should be made substituting Shoeman, Marsh, Updike & Welt as plaintiff's attorney, whether Robert Cohen is in a conflict of interest, and if so what corrective steps are to be taken, now, on motion of



Stephen Hochhauser, respondent pro se,
IT IS -

ORDERED, that a hearing be held on October 4, 1982, before the Court, at the County Courthouse, 262 Old Country Road, Mineola, New York 11501, at 9:30 A.M., to determine whether an order should be made substituting Shoeman, Marsh, Updike & Welt as plaintiff's attorney, whether Robert Cohen is in a conflict of interest, and if so, what corrective steps are to be taken, and, IT IS FURTHER

ORDERED, that defendant Robert Reed or his attorneys, deliver to Plaintiff a current mailing list of the general and limited partners of Aljer Realty Company, Simon Cohen Company, Simon Cohen Real Estate and Management

Company, and Simon Cohen Realty Company,
and, IT IS FURTHER

ORDERED, that within ten days
after the date hereof, the plaintiff, at
his own cost, shall mail a copy of the
decision of the court, dated August 3,
1982, together with a copy of the Notice
of Hearing appended to the decision, to
the general and limited partners at the
addresses designated on the mailing list
as supplied to plaintiff by defendant
Robert Reed or his attorneys, and, IT IS
FURTHER

ORDERED, that pending
determination of the matters to be heard
at the hearing, all other questions

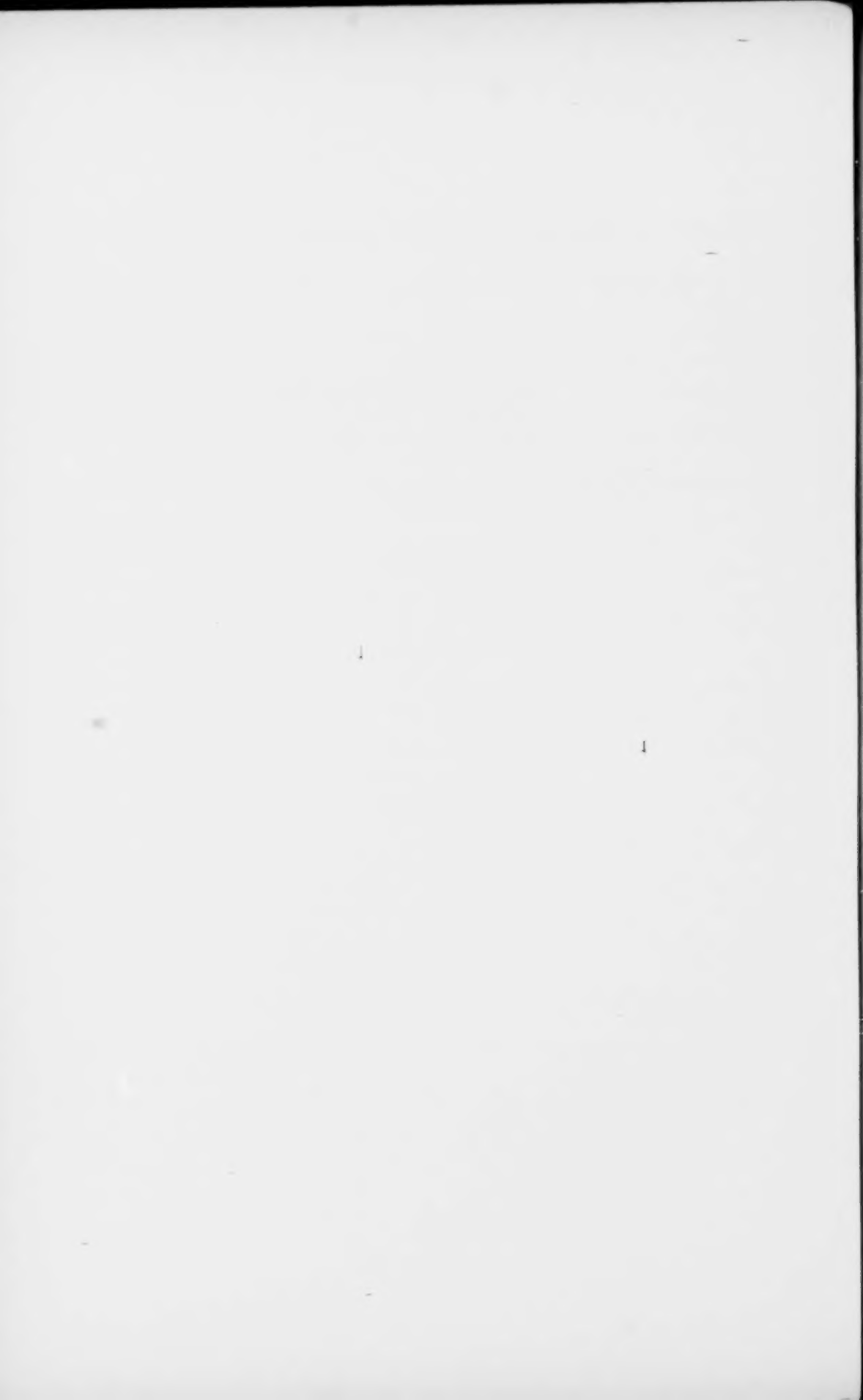


A170

raised in the motions and cross motions
will be held in abeyance.

/s/ C. Raymond Radigan
Judge of the
Surrogate's Court

[ENTERED August 17, 1982.]



APPELLATE DIVISION:
SECOND DEPARTMENT

-----X		
Robert Cohen,	:	
individually,	:	
appellant, et al.,	:	<u>DECISION</u>
plaintiff, v	:	
Robert J. Reed,	:	No. 7007
et al.,	:	
respondents.	:	
Estate of Simon	:	
Cohen (Application	:	
to fix attorney's	:	
fees).	:	
-----X		

Motion by appellant to stay the hearing
scheduled to commence in the Surrogate's
Court, Nassau County, on or about
October 4, 1982, pending determination



A172

of the appeal from an order of said court, entered August 17, 1982.

Motion denied.

GIBBONS, J.P., GULOTTA, BRACKEN & RUBIN,
JJ., concur.

September 30, 1982

No. 700

COHEN v REED:
ESTATE OF
SIMON COHEN



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION
ually and as a partner
of Simon Cohen Real :
Estate Co., et al., : File No. 148704

: Dec. No. 194

Plaintiffs,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants,

:

Estate of Simon Cohen,

Application to Fix :

Attorneys' Fees under

SCPA 2110 :

-----X

This is a motion by the
plaintiff for an order directing that
the court be disqualified on the grounds
of personal bias and prejudice.

This action was commenced by
the plaintiff, Robert Cohen,
individually and derivatively on behalf
of certain partnerships in which the

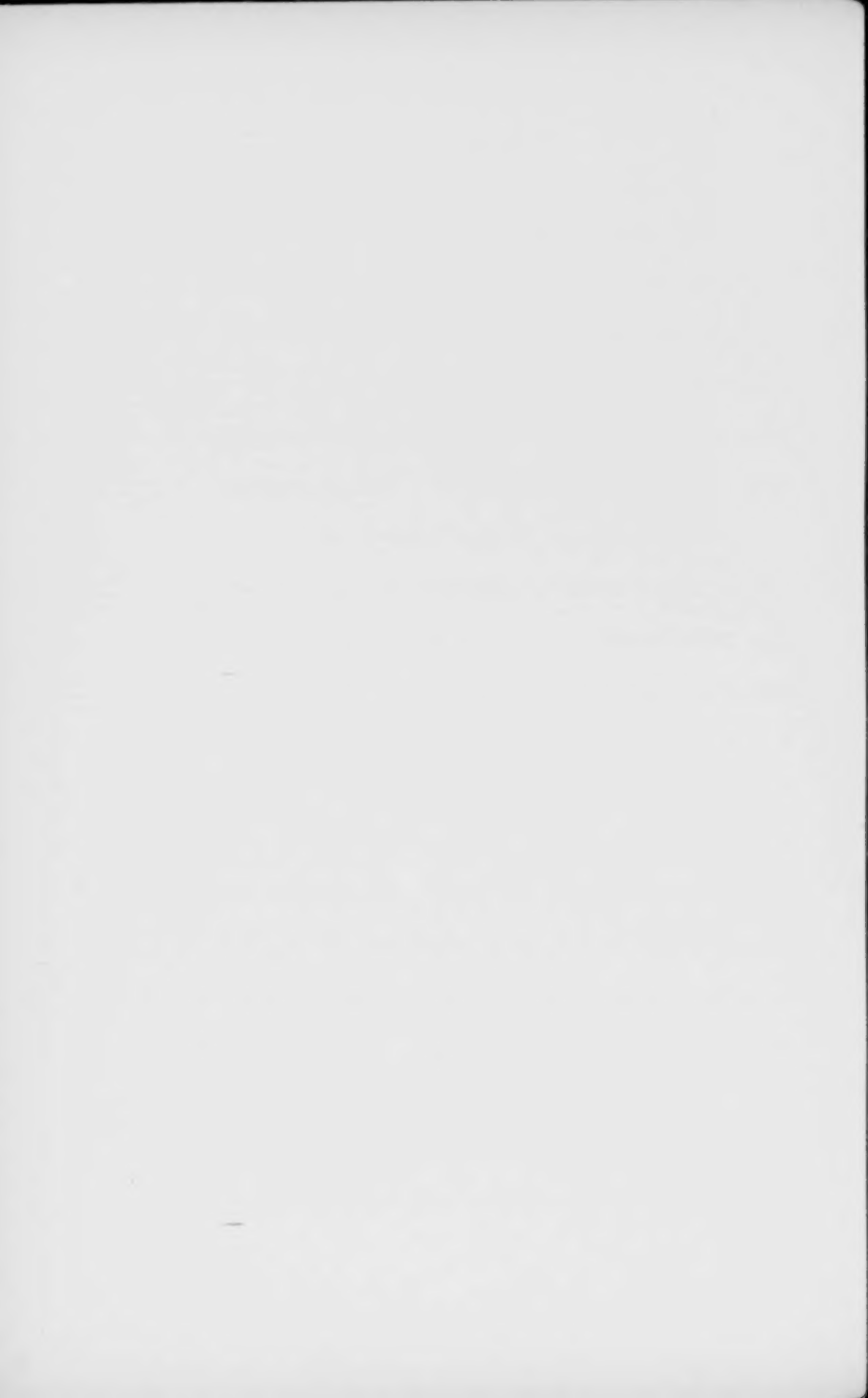


decedent Simon Cohen has an interest. The plaintiff contends that his father, Simon Cohen and other defendants siphoned monies from these partnerships and in addition diverted profits from the Mid-Island Hospital, Bethpage, New York, which profits were allegedly to be paid to one of the partnerships pursuant to a lease agreement. There are additional allegations, too numerous and complex to discuss here. The amended and supplemental complaint comprises seventeen causes of action sixteen of which were brought by the plaintiff on behalf of various partnerships and one of which was brought by the plaintiff, individually.

Lengthy discovery proceedings were conducted, in the midst of which the defendants moved for summary



judgment and dismissal. Judge Bennett, who was the Surrogate at that time denied the motions, without prejudice, pending completion of discovery. At the conclusion of the discovery proceedings the motions were renewed. This Judge, who was then the Chief Clerk of the Court submitted a referee's report which was confirmed by Judge Bennett in a decision dated November 28, 1979. The decision granted the motion to dismiss both the first and third causes of action and denied the motion as to the remaining causes of action. On reargument the court adhered to its original decision. The matter proceeded to trial before the Chief Clerk as referee. During the course of the trial, this Judge was elected to the position of Surrogate and the parties



consented to have him continue to hear the case.

At the time that this motion was made, the plaintiff was a few days short of resting his case and over fifty days of trial had been completed. At this point the plaintiff Robert Cohen moved for an order pursuant to CPLR 321 directing the substitution of Schoeman Marsh Updike & Welt as attorneys in place of Mr. Hochhauser, determining Mr. Hochhauser's fee and directing the turnover of books and records by his former attorney, Mr. Shannon and requested that his fee be determined. Mr. Hochhauser cross-moved for the same relief and in addition sought advice and direction from the court in connection with an allegation that the plaintiff was in a conflict of interest with other

partners on whose behalf the action was commenced. It is Mr. Hochhauser's contention that the plaintiff has frustrated settlement negotiations because of personal dislike for one of the defendants Mr. Reed, and refuses to accept any proposals which do not provide for his removal as Director of the Mid-Island Hospital even though the question of Reed's continuation is not an issue in this case.

Thereafter, Mr. Cohen brought on the instant motion for disqualification on the ground of personal bias. The following are some of the situations in which the plaintiff contends the court displayed bias and prejudice:

1. The court made erroneous rulings with respect to



discovery proceedings and declined to rule on certain matters at the time of the dispositions, requiring instead that formal motions be made;

2. the court failed to direct a substitution of attorneys and instead directed a hearing;

3. the court required the plaintiff to attend settlement conferences;

4. this action was delayed by the court resulting in added expense to the plaintiff;

5. the guardian ad litem's conduct in this case was inappropriate.



6. disparaging remarks about Mr. Cohen were made by the Judge to Mr. Shannon and directly to Mr. Cohen during a conference;

7. the decision dated August 2, 1982 indicates that the court is prejudiced against the plaintiff.

The plaintiff does not claim the Judge should be disqualified because of any pecuniary interest in the matter or consanguinity or affinity to any party in the controversy (Judiciary Law §14). Disqualification is sought solely on the basis of alleged bias and prejudice.

An application to disqualify a judge because of prejudice or bias as

distinguished from legal disqualification is addressed solely to the discretion of the judge (People v Patrick, 183 NY 52).

Turning first to the question of adverse rulings, the fact that the plaintiff does not agree with certain rulings made during the course of the trial is not a basis for disqualification. Adverse rulings standing alone do not establish judicial bias or prejudice (Berger v United States, 255 US 22), nor do they create a reasonable question of judicial impartiality (United States v Schwartz, 535 F2d 160, cert den 430 US 906). Such rulings are subject to correction on appeal as are any rulings made by this Judge as a referee during the course of examinations before trial.



The order directing that a hearing be held on the questions of substitution and conflict of interest is likewise subject to correction on appeal, and has indeed been appealed by the plaintiff to the Appellate Division. It was the court's opinion, after exhaustive research of cases involving derivative and class actions that the court, having been charged with the responsibility of protecting the rights of absent partners (see e.g. *Pettway v American Cast Iron Pipe Co*, 576 F2d 1157, cert den 439 US 1115) should apprise those partners of the status of the litigation and the issues raised by Mr. Hochhauser. Whether or not the court's decision was erroneous is a matter for the appellate review not a ground for disqualification. Addition-

ally, the court is hard-pressed to understand how its decision to refrain from determining the issues without giving all interested parties a chance to be heard, suggests any prejudice or bias against the plaintiff.

It is true that Robert Cohen was required to attend settlement conferences in an attempt to amicably resolve this matter. Mr. Cohen complains that it was necessary for him to travel from California to attend the conferences. Mr. Cohen is the plaintiff in this action commenced in the State of New York and he has made numerous trips to and from the West Coast for the purpose of attending the trial. In addition, an attempt was made to schedule the conferences at a time when Mr. Cohen was in New York. The need to



call Mr. Cohen in personally for conferences was occasioned by the fact that he had retained numerous attorneys to advise him with respect to the litigation, some of whom were never before the court and never attended any of the conferences. This seriously impeded the progress of the negotiations. Moreover, under the circumstances the court was wary of continuing with the negotiations without the presence of the plaintiff. In any event the Uniform Rules call for the presence of parties at pretrial conferences (22 NYCRR 1830.21).

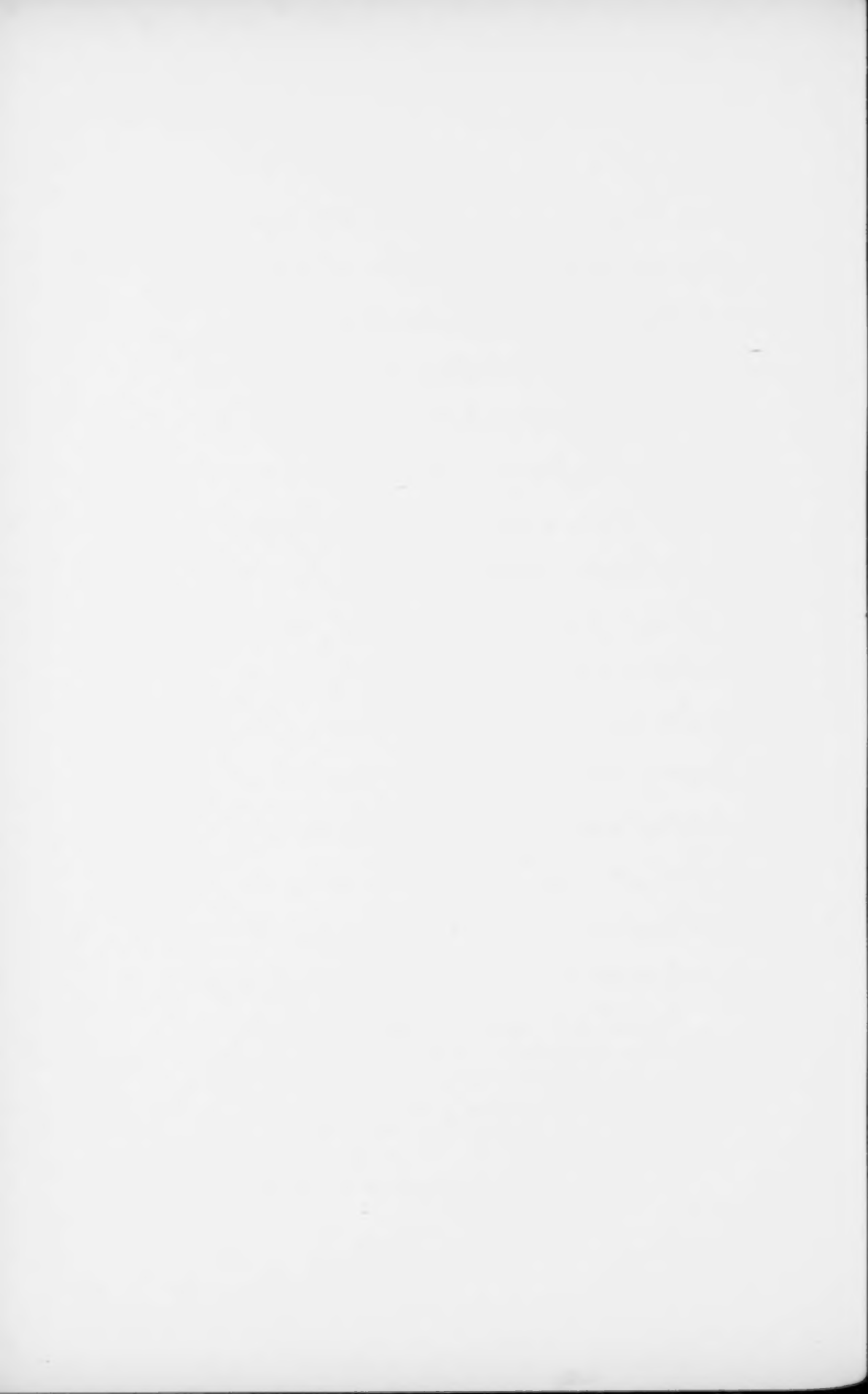
Mr. Cohen further alleges that the decision dated August 2, 1982 indicates bias on behalf of the Judge in that it concludes that Robert Cohen has opposed certain settlement proposals



because they do not provide for the removal of Reed as Director of the Mid-Island Hospital. The plaintiff states that if this information was obtained from an "extrajudicial" source that would be sufficient ground for removal.

This court has not had any "extrajudicial" communication concerning this case. The conclusion set forth in the decision was arrived at not only by the position taken by Mr. Cohen in settlement negotiations but by the statements set forth in the plaintiff's affidavit in opposition of Mr. Hochhauser's cross-motion for advice and direction in which Mr. Cohen states:

"* * * Reed is one of the defendants most directly involved with the extraordinary pattern of breach of fiduciary duty evidenced in this action. The court is familiar with the



extraordinary ingenuity of many of the schemes employed to siphon funds out of the hospital and to deprive the respective partnerships of their rightful income. Given that extraordinary history, it could not possibly be in the interests of the plaintiffs to continue Mr. Reed in direct control of the sole source of income of the partnership entities and without any finding of liability for the clear misconduct of the post.

10. I have carefully considered that the proposed settlement provides for the estate, for my personal trust, for the appointment of additional general partners for the partnerships and for certain auditing rights and other procedural benefits. However, these protections do not by any means assure that the tortious history of Mr. Reed will not continue. In a real sense, the settlement merely erects fences around the chicken coop but leaves the fox inside.

* * *

A judge should not disqualify himself on the basis of conclusions



learned from his participation in the case as distinguished from "extrajudicial" knowledge (Wolfson v Palmieri, 396 F2d 121) particularly where the facts are gleaned from the affidavit of the party who seeks the disqualification.

The court does not feel that the allegations made in connection with the conduct of the guardian ad litem for certain infant beneficiaries of the estate, or alleged delays in the proceeding, support a motion for disqualification.

Lastly, we turn to the allegation that the Judge confronted Mr. Cohen's former attorney Mr. Shannon and that the following conversation took place in "words or substance":



"Judge Radigan: 'I don't want to allow Cohen in the Hospital. I think Cohen is a disruptive force and I am reluctant to give him continued access to the Hospital'.

Mr. Shannon: 'But Judge if you find fraud how can you prevent it?'

Judge Radigan: 'Well then, perhaps I can't find fraud.'"

(This encounter was allegedly relayed by Mr. Shannon to Robert Cohen although there is not supporting statement by the former attorney corroborating this conversation).

Whether or not such a statement reflects a bias against the plaintiff is a question which need not be addressed since the conversation never took place. No such statements or any similar statements were ever made by this Judge. There is therefore no occasion to discredit its veracity



observing that Mr. Cohen's charge is based merely on hearsay (see *Hodgson v Liquor Salesmen U Loc No 2 of State of N Y*, 444 F 2d 1344).

The court is aware that not only actual bias or prejudice but even the appearance of prejudice on the part of a judge must be avoided (*Corradino v Corradino*, 48 NY 2d 894). However, this rule should not extend to a situation where remarks attributed to a judge were never uttered. If a judge were compelled to recuse himself in every such case, any party to a proceeding could cause the transfer of a case to another judge because of dissatisfaction with rulings or decisions made by the court.

With respect to the statements made about appointing a guardian ad



litem for Mr. Cohen, the technical and hypothetical question of Mr. Cohen's capacity to evaluate any settlement proposal was raised by Mr. Cohen's attorney, Mr. Hochhauser during a conference. In response to Mr. Hochhauser's possible concern about his client, the Judge replied that in the event Mr. Cohen required assistance, a guardian ad litem could be appointed for him. This was a response to a purely procedural question, which the court felt the responsibility to answer, and not an expression of a personal opinion as to whether Mr. Cohen was capable of managing his own affairs.

It is noted that this motion was brought on shortly after the decision dated August 2, 1982, with which the plaintiff disagrees, even



though the alleged conversation between Mr. Shannon and the Judge is said to have taken place in December, 1981 and notwithstanding no motion to recuse was made. Additionally following the allegedly prejudicial rulings made by the judge as referee during the course of pretrial examinations, the plaintiff consented to have the Judge continue to preside over the case.

Where a judge is satisfied that no bias or prejudice exists, he is under an obligation to preside even when challenged (Matter of Robin O, 80 Misc 2d 242; Matter of Natter, 70 Misc 2d 791).



A191

The application is denied.

Dated: October 1, 1982.

C. RAYMOND RADIGAN
Judge of the
Surrogate's Court



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	NOTICE OF
ually and as a partner	:	SETTLEMENT
of Simon Cohen Real	:	<u>OFFER</u>
Estate Co., Inc.,	:	
	:	File No. 148704
Plaintiff,	:	Dec. No. 38
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants,	:	
	:	
ESTATE OF SIMON COHEN	:	
	:	
-----X	:	

NOTICE OF SETTLEMENT OFFER

This proceeding commenced by Robert Cohen, individually and on behalf of certain partnerships, having been transferred from the Supreme Court, Nassau County, is now pending in the Surrogate's Court, Nassau County.

DESCRIPTION OF LITIGATION

The amended and supplemental complaint alleges seventeen causes of action, sixteen of which are brought derivatively on behalf of the following partnerships: Simon Cohen Real Estate and Management Company (SCREAM); Simon Cohen Company (SCC); Simon Cohen Realty Company (SCR); and Aljer Realty Company (Aljer). The defendants are the various partnerships; the executors of the estate of Simon Cohen individually and in their fiduciary capacities as executors, and in some cases as general partners in the various partnerships; William B. F. Werner; Mid-Island Hospital (M-I-H); Juan Soto; Elaine Wilschek; Sheldon Katz; Judah Feinerman; J. S. K. Cleaning Services, Inc.,



Jasdane, Inc.; Volume Feeding, Inc.;
DADGAB, Inc; and Brimsco, Inc.

The following is a general summary of the causes of action and is not intended to be all-inclusive.

The first cause of action concerns a sublease between M-I-H and SCREAM and alleges that the negotiations between M-I-H and SCREAM for a sublease which allegedly provided that SCREAM would be entitled to 100% of the rents and profits of M-I-H inadvertently omitted a provision which would have provided for inspection of M-I-H's books and records. A reformation of the sublease is sought. The second cause of action brought on behalf of SCREAM alleges that the omission with respect to the inspection and audit was a product of fraud. The third cause of

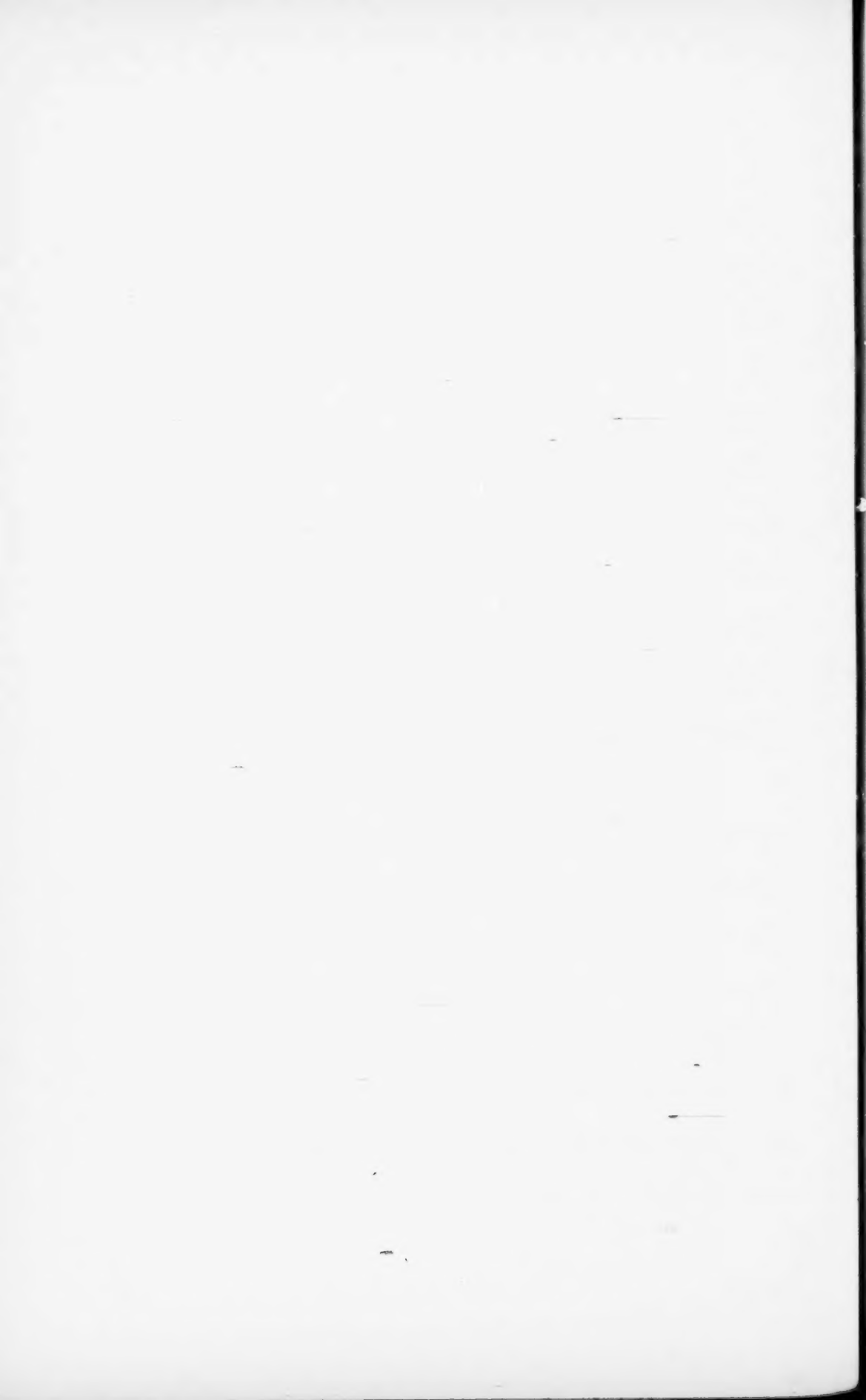


action is a claim that the sublease impliedly gives a right of inspection and audit.

The fourth cause of action on behalf of SCR alleges that Simon Cohen made unauthorized withdrawals from SCR. The fifth cause of action alleges that Reed, Hackell, Potter, Citibank and Werner-M-I-H aided and abetted Simon Cohen in carrying out and concealing the wrongful withdrawals.

The sixth cause of action concerns the alleged failure of the executors to inform the SCR partners of the alleged wrongdoing.

The seventh cause of action brought on behalf of SCREAM alleges that Simon Cohen made wrongful withdrawals from SCREAM for his personal use. The eighth cause of action concerns alleged



wrongful acts by Reed in connection with repayment of alleged loans from SCREAM TO Simon Cohen. The ninth cause of action alleges that Simon Cohen, with Reed's assistance, permitted Werner-M-I-H to enter into contracts with various businesses as a result of which Werner-M-I-H paid substantially greater sums for services which had previously been performed by its employees and that this resulted in a loss of revenues to SCREAM. The tenth cause of action alleges that some of the defendants knew and participated in the alleged scheme to defraud SCREAM. The eleventh cause of action alleges that Reed wasted the assets of SCREAM.

The twelfth cause of action alleges that Reed wasted the assets and mismanaged SCR.



HISTORY OF LITIGATION

The original complaint in this action was served in 1971. An amended and supplemental complaint was served in August, 1974. The defendants moved for an order dismissing each cause of action and an order granting summary judgment. The court reserved decision to allow the parties to exhaust all discovery devices. Following the completion of discovery reargument of the motion for summary judgment was made before the Hon. C. Raymond Radigan as Referee. In a report dated August 22, 1979 he recommended that the motion for an order granting summary judgment be denied and the motion for an order dismissing the first and third causes of action be granted and that the motion for an order dismissing each of the remaining causes



of action be denied. The report was confirmed by Surrogate Bennett in a decision dated November 28, 1979.

The trial commenced before the Hon. C. Raymond Radigan as Referee. Thereafter, the parties consented to have the case continue before him as Surrogate of Nassau County. Currently, more than fifty days have been occupied at trial. Towards the end of the plaintiff's case the plaintiff, Robert Cohen, filed a motion requesting that Mr. Hochhauser be discharged as plaintiff's attorney, that his fee be determined and that he be required to turn over books and records in his possession. Mr. Hochhauser made a cross-motion for advice and direction stating that Mr. Cohen has obstructed settlement negotiations because he was



motivated by personal animosity towards Mr. Reed and would not accept any proposal which did not provide for the removal of Mr. Reed as executive director of M-I-H. Mr. Hochhauser further states that Mr. Cohen is in a conflict of interest as nominal plaintiff in the derivative suits. In its decision dated July 30, 1982 the court determined that the limited and general partners of Aljer, SCREAM, SCC and SCR should be apprised of (1) the status of the negotiations in this matter; (2) the application for an order substituting counsel; and (3) the question raised as to a possible conflict of interest.

The plaintiff was directed to mail a Notice of Hearing to the partners informing them that a hearing would be conducted on October 4, 1982 at 9:30 a.m. at the Surrogate's Court, Mineola, New York, and that any person who wished to be heard should appear in person or by counsel.

In a decision dated October 1, 1982 the court denied Mr. Cohen's motion for recusal.

Thereafter a hearing was conducted and the three issues outlined above were submitted for decision, as was the plaintiff's motion for a stay of this proceeding and Mr. Hochhauser's cross-motion for a stay of proceedings pending in any other court.

In the interim, further settlement negotiations were conducted



at which time Mr. Cohen submitted a proposed settlement agreement. Some of the defendants then submitted a counter-proposal.

A further conference was held in which the Surrogate informed the parties that a notice of settlement incorporating the essential terms of the defendants' offer would be forwarded to the partners. The purpose of this notice is to inform the partners of the terms of the settlement which have been suggested and to afford them an opportunity to inform the court whether they consent to the proposal as being the minimal terms which they would accept or object to the terms of the settlement. Attached is a copy of the proposed settlement.

This notice does not suggest any approval of the proposed settlement by the court which would ultimately determine whether the proposed settlement terms are reasonable.

If the court finds that any of the attorneys are entitled to fees for services rendered on behalf of the partnerships some or all of the fees plus disbursements and expenses may be deducted from the amount of the recovery paid to Robert Cohen as reimbursement or directly to the attorneys.

Any partners who choose to take a position with respect to the terms set forth in the notice must respond directly to the court in writing on or before February 16, 1983 at the following address: Surrogate's Court,



SURROGATE'S COURT:
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	
Estate Co., et al.,	:	File No. 148704
	:	Dec. No. 421 & 42
Plaintiffs,	:	
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants,	:	
	:	
Estate of SIMON COHEN,	:	
Deceased. Proceedings	:	
to Fix Attorneys Fees	:	
and for Advice and	:	
Direction under SCPA	:	
§2110.	:	

-----X

This is a transferred Supreme Court action was commenced by the plaintiff, Robert Cohen, individually and derivatively on behalf of certain partnerships in which the decedent had an interest. Generally, the plaintiff alleges that the defendants fraudulently



deprived the partnerships of assets. A central issue in the case is whether Simon Cohen Real Estate and Management Company was deprived of profits which it was allegedly entitled to receive from the Mid-Island Hospital pursuant to an agreement. During the pendency of the proceeding and at a point when the plaintiff was approaching the close of his case, the plaintiff moved pursuant to CPLR 321 for an order directing that Mr. Hochhauser be removed as plaintiff's attorney, that his fee be determined and that his fee be determined and that the fee of former attorney, Mr. Shannon, also be determined. Mr. Hochhauser cross-moved for advice and direction concerning Mr. Cohen's alleged inability to continue as a representative



plaintiff because of a conflict of interest.

Mr. Hochhauser took the position that it was his responsibility as attorney for the various partnerships to bring to the attention of the court what he believed to be a personal animosity on the part of Mr. Cohen towards one of the defendants, Mr. Reed. It is contended by Mr. Hochhauser that due to a personal dislike for Mr. Reed, Mr. Cohen refused to accept any settlement proposals which did not provide for the removal of Mr. Reed as executive director of the Mid-Island Hospital, and that these refusals were not in the best interests of the other partners.

In a decision dated August 2, 1982 the court determined that the

allegation of conflict of interest was sufficient cause for the court to exercise its power to conduct an inquiry where the interests of partners not actively participating in the action might be jeopardized (see Pettway v American Cast Iron Pipe Co., 576 F2d 1157, cert den 439 U.S. 1115). It was determined that a hearing on the conflict of interest question should be conducted and that the questions relating to substitution of counsel and attorneys' fees would be held in abeyance. Additionally, the court directed that a Notice of Hearing and a copy of the August 2, 1982 decision be forwarded to all of the partners on whose behalf the action was commenced and that the Notice should apprise the



partners of the issues and status of settlement negotiations.

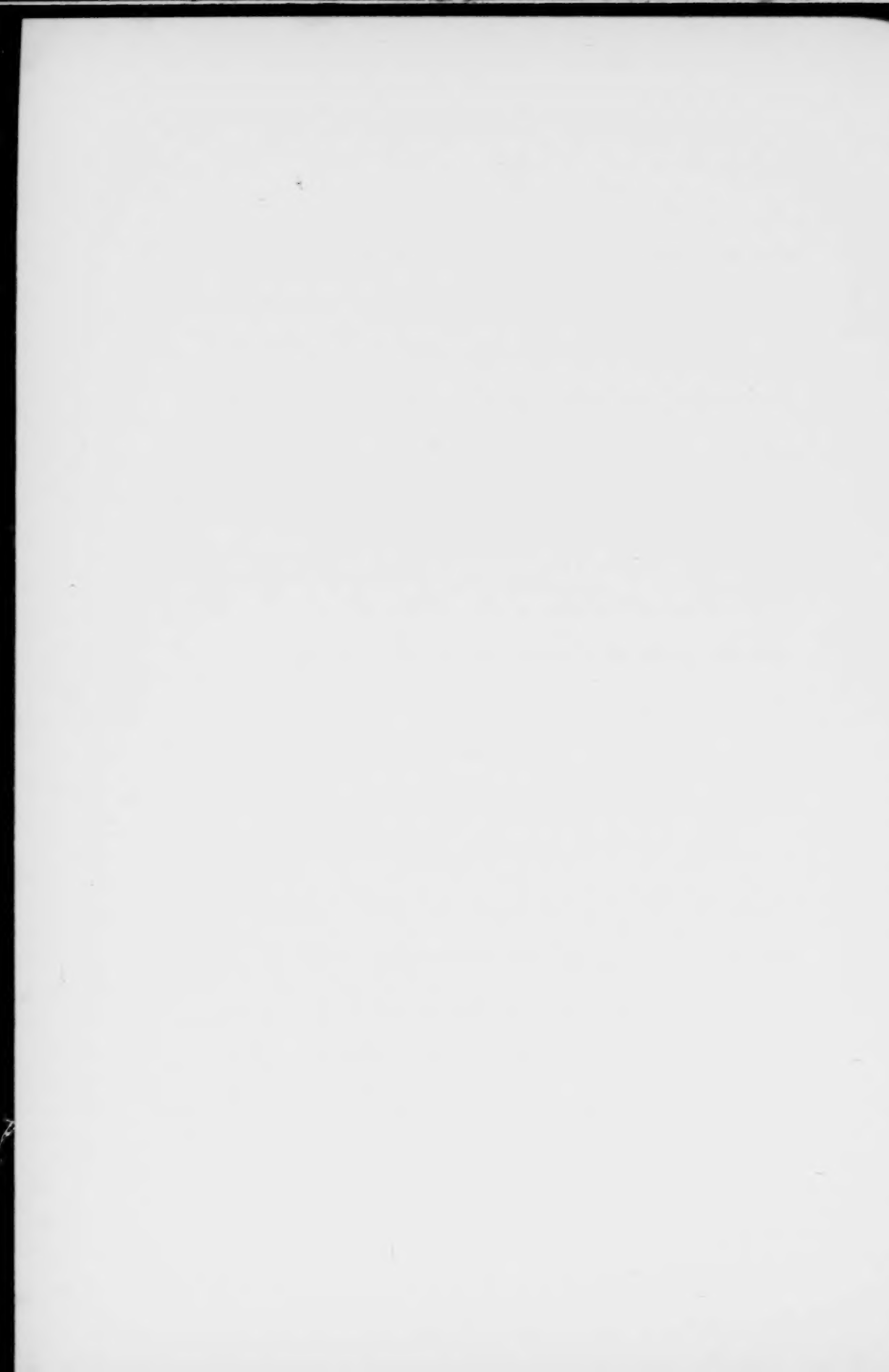
The plaintiff was directed to forward the Notice and a copy of the court's decision to the partners. It subsequently became apparent that the information was sent, accompanied by various materials (including letters which reiterated the plaintiff's position as to settlement), none of which had been authorized by the court.

Thereafter the plaintiff made a settlement offer and the defendants a counter-offer and it was determined by the court that the partners should receive a new Notice informing them of the current status of the litigation, including a copy of the defendants' settlement offer. The partners were directed in the Notice to respond in



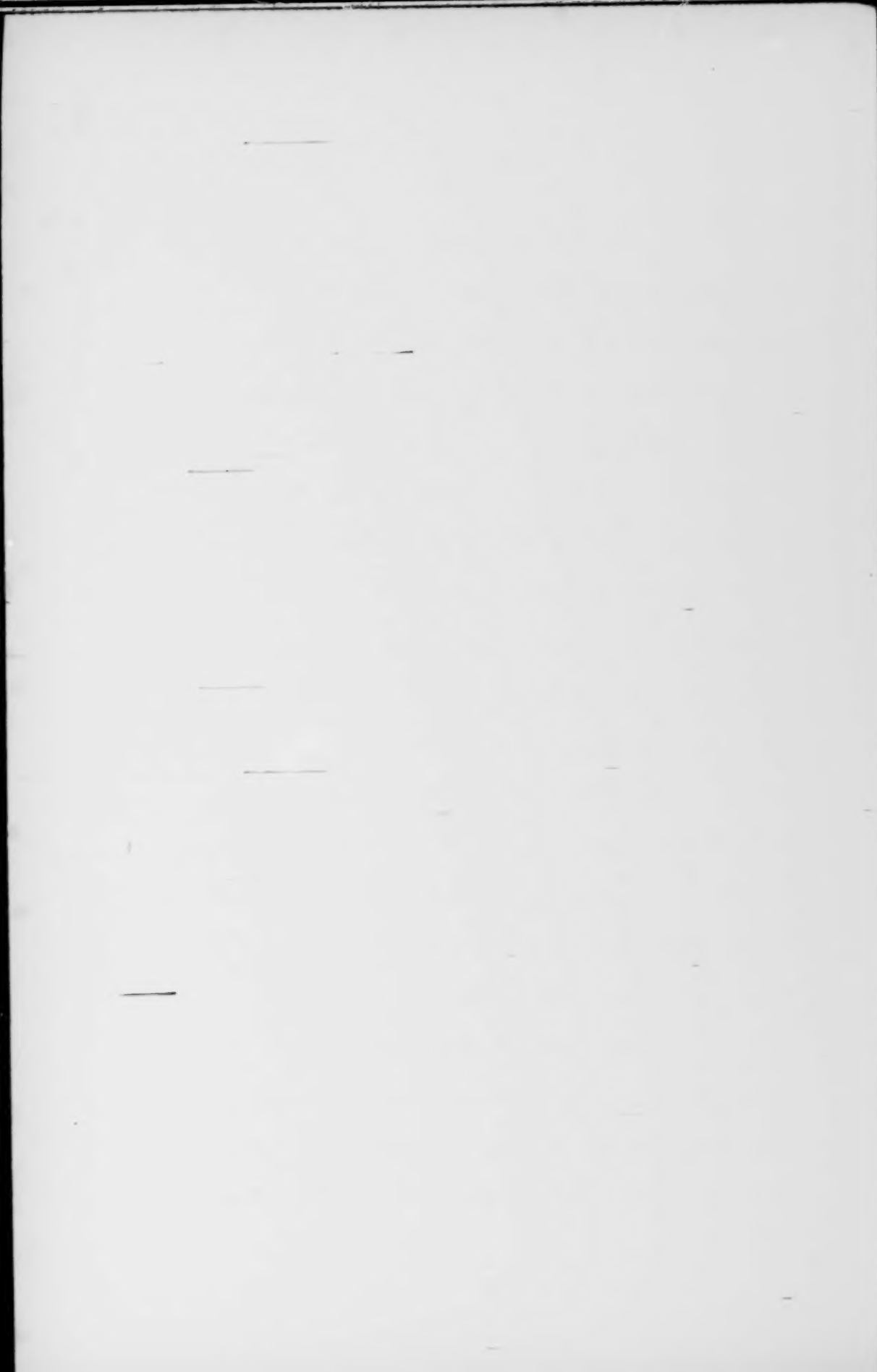
writing to the court indicating their acceptance or rejection of the offer on or before February 16, 1983.

In the interim, the plaintiff moved for an order directing a stay of the proceedings in this court as to the issues raised by the motion pursuant to CPLR 321, pending a determination in the United States District Court in an action by the plaintiff against Mr. Hochhauser for damages arising out of alleged misconduct by Hochhauser as an attorney in this proceeding. Hochhauser cross-moved for a stay of the federal action, although he contends that as of October 6, 1982, the date of his affidavit, no complaint had been served. Both the motion and cross-motion for a stay will be decided herein.



At the hearing on the question of disqualification Mr. Cohen was represented by his own attorney, Mr. Schoeman. Mr. Schoeman objected to certain questions on the grounds of attorney-client privilege. The court ruled that Cohen could be compelled by the "class" attorney to testify to communications with his attorneys. The nominal plaintiff and the partners are in the position of clients who consult an attorney for their mutual benefit and, therefore, there is no privilege as between the partners and Cohen (*Oursler v. Armstrong*, 10 Misc 2d 654 affd 8 AD2d 194 app dsmd 6 NY2d 998).

Additional questions concerning the privilege were raised by the defendants who contended that they were entitled to be present during the



entire hearing and that the plaintiff had waived any privilege which attached to communications with his attorneys by prior disclosures.

At various times during the hearing the defendants were excluded and the record was sealed pending a decision as to possible waiver of the attorney-client privilege and relevancy.

I

The disclosures in question may be categorized as follows: 1) Letters prepared by Cohen; 2) Descriptions of communications between Cohen and Hochhauser which were incorporated into Cohen's pleadings; 3) Letters from Hochhauser to Cohen which were annexed as exhibits to the plaintiff's pleadings; and 4)



Communications between Hochhauser and Cohen which were revealed to the partners and a third party.

Letters Prepared by the Plaintiff

It is contended that a letter dated February 12, 1982 prepared at the direction of Hochhauser by the plaintiff concerning proposed terms of settlement is discoverable by the defendants.

Mr. Hochhauser asserts that the plaintiff prepared the letter with the intention of submitting it to the court and therefore the letter is not privileged. Cohen objects to disclosure.

The attorney-client privilege afforded by CPLR 4503 applies to communications originating from the client as well as communications from



attorney to client (DeLong v. Siebrecht, 196 AD 74; Matter of Van Gorder, 10 Misc 2d 649). The privilege extends not only to oral communications but to communications in writing (DeLong v. Siebrecht, supra).

It is well established that agency is not within the scope of the lawyer's professional employment and consequently proof of agency or instructions to deliver a document are not privileged (Matter of Creekmore, 1 NY2d 284; Rosseau v. Bleau, 131 NY 177). Likewise, the contents of the document are not privileged where it is intended by the client that they be imparted to another (Brown v. Ingersoll, 226 NYS2d 479). This includes matters which are disclosed during settlement negotiations to opposing counsel or to a third party



(8, J. Wigmore on Evidence [3rd Ed.]
§2325).

In the instant case, however, the letter was prepared by the plaintiff at the direction of his attorney and was addressed to the attorney. The circumstances surrounding the preparation of this document presupposes that it was the client's intention to consult with his attorney and obtain his legal advice as to these items. This conclusion is supported by the fact that the document was never delivered to the court at the insistence of the attorney. The court therefore concludes that the letter and the discussions between Mr. Hochhauser and Mr. Cohen concerning the letter are communications which are protected by the attorney-client privilege and that the privilege was not



waived. The same conclusion is reached with respect to the May 27, 1981 letter to the Court, which was never mailed, and the February 23, 1982 letter.

Communications Related in Pleadings

It is asserted that Cohen waived the attorney-client privilege by statements made in his affidavit in opposition to the cross-motion for disqualification and by attaching to the affidavit a copy of the September 8, 1981 letter which evaluates the success of each cause of action and evaluates certain settlement proposals. A party may waive the attorney-client privilege by furnishing a privileged communication to his adversary (*Mut. Ins. Co. v. Engels*, 21 AD2d 808; *Matter of Saxl*, 27 Misc 2d 658).



Cohen's recitation of his position with regard to Reed's removal does not, standing alone, constitute a waiver of the attorney-client privilege. In the affidavit Cohen states his opinion, but does not reveal any confidential communications.

The September 8, 1981 letter is an item which comes within the attorney-client privilege (CPLR 4503) and is therefore protected from disclosure (CPLR 3101[b]) unless the privilege is waived. By making the letter public the privilege was waived as to that particular item. A further question arises as to whether the privilege was waived as to other items concerning the same subject matter.

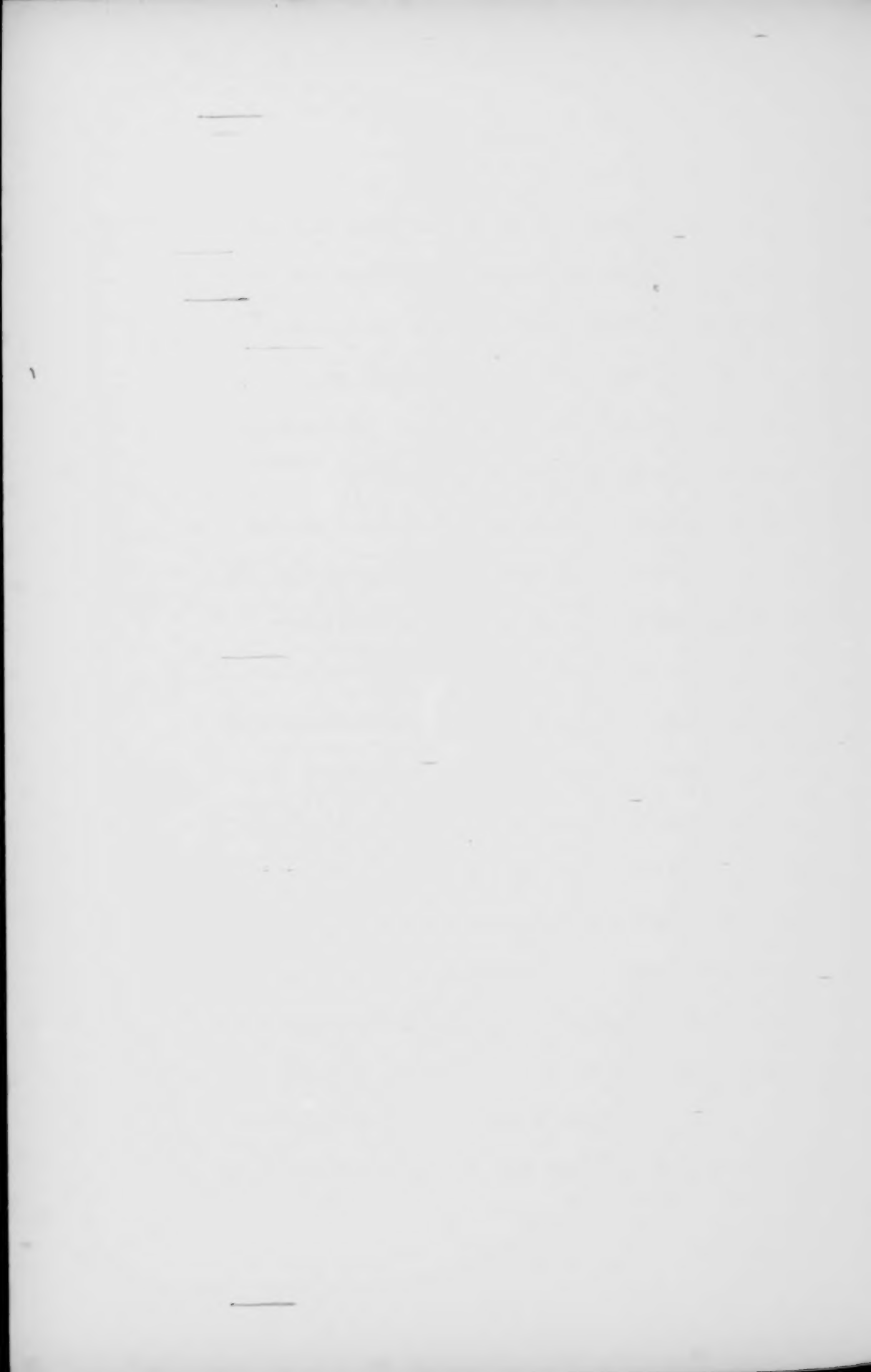
The general rule is that, where a party discloses privileged



communications as to a certain subject matter, he waives the privilege as to communications on the same subject.

However, the weight of authority supports the view that where the attorney and client become adversaries, a different rule applies. In a controversy between themselves as to compensation or where the client questions the adequacy of representation the privilege is waived so as to permit the attorney and client to defend his rights (McCormick on Evidence [2nd Ed.] §91). This rule applies not only to independent litigation between the attorney and client, but litigation between the client and third parties as well (McCormick on evidence, supra).

In New York recognition has been given to the fact that it would be



unfair to the client to permit the waiver of the privilege in an attorney-client dispute to be extended to a dispute between the client and third parties (*Matison v. Matison*, 95 NYS2d 837 affd 97 NYS2d 550 [waiver of privilege did not extend to subsequent actions with third parties]).

The adequacy of the attorney's services is an issue which relates to the question of substitution but has not been injected as an issue in the main case (cf. *Matter of Hart*, supra [allegation that waiver of right of election not made knowingly]).

Accordingly, the court finds that with respect to the items set forth in Cohen's affidavit in support of the substitution motion and the exhibits annexed thereto, the privilege was not



waived so as to permit disclosure of other communications protected by the attorney-client privilege.

Additionally, the statements made in plaintiff's affidavit in support of the motion for recusal do not constitute a waiver of the privilege with the exception of items (A), (B), (C) and (D) on page 2 of the letter dated February 23, 1982, which deals with the same subject matter addressed in the affidavit. However, these items concern only trial strategy and are clearly not material and necessary to the defendants in the main case.

Communications from Plaintiff to
Partners and Third Parties

The plaintiff concedes that following the court's direction that notice of the hearing be forwarded to



the partners, he forwarded such a notice accompanied by a packet of information which included 1) a copy of the September 8, 1981 letter; 2) a copy of a letter from plaintiff's California lawyer to Robert Reed; 3) a copy of a letter (July 22, 1972) from Robert Cohen to the decedent's grandchildren (not forwarded to all partners]; and 4) a copy of a letter dated July 19, 1982 from Cohen to the partners, which reveals hit attorney's advice as to acceptance of settlement offers.

The defendants contend that since the information disclosed to all of the partners was not restricted to specific causes of action, the privilege was waived. For example, the partners of Simon Cohen Real Estate and



Management Company received information concerning Simon Cohen Realty.

The disclosure of Hochhauser's communications to all of the partners may not in itself constitute a waiver of the privilege since the disclosure was to co-parties (see Burlington Industries v. Exxon Corp., 65 F.R.D. 26) who were represented by the same attorney.

However, it is not necessary to explore this aspect of the question in any detail. The forwarding of the information to the guardian ad litem representing an infant grandchild of Simon Cohen, in her capacity as a beneficiary of the estate, constituted a waiver of the attorney-client privilege (as well as work product exception). However, the waiver of the privilege as



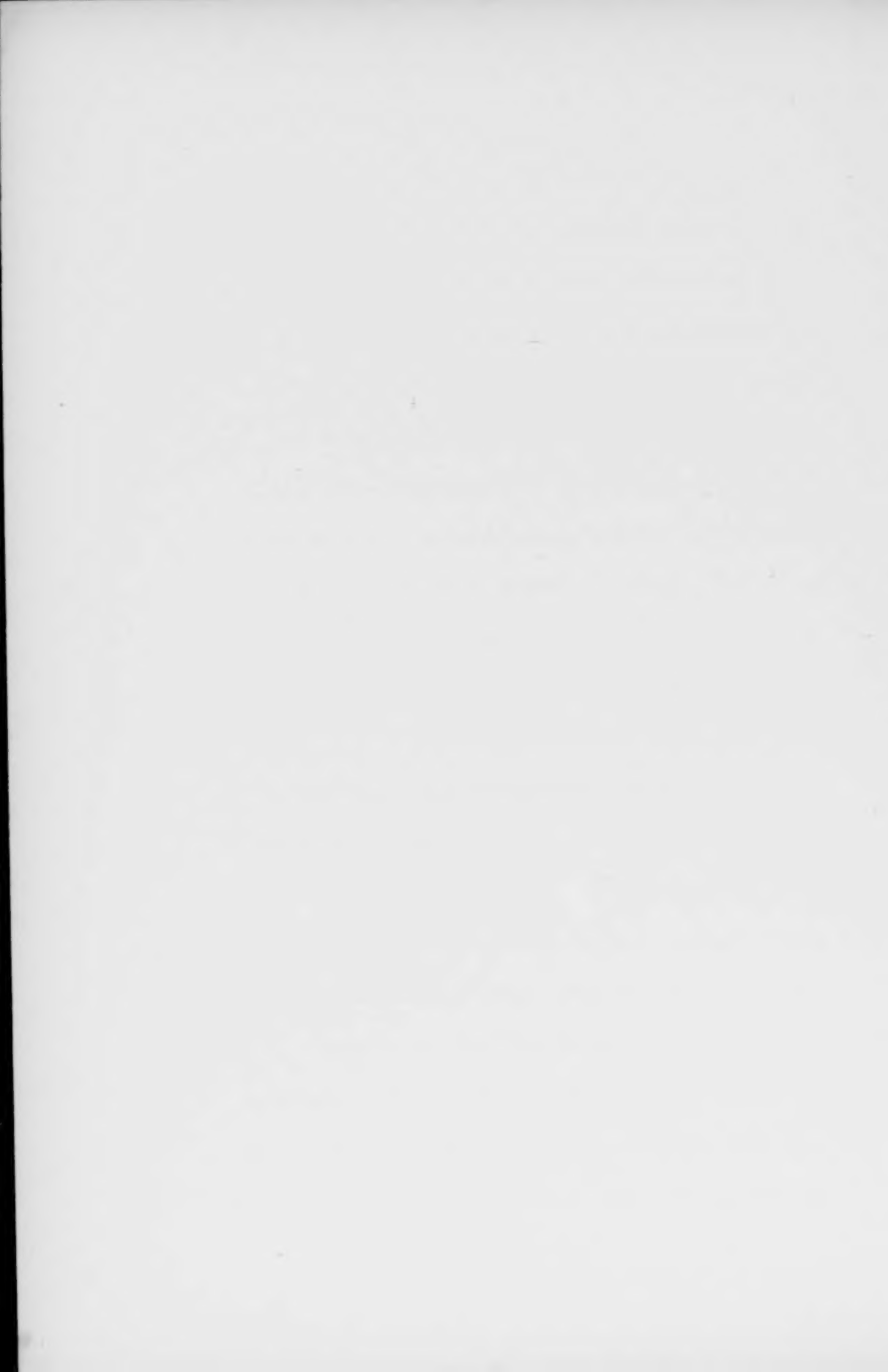
to those documents does not trigger the right to further disclosure of the testimony or other documents in evidence.

The scope of Mr. Hochhauser's testimony was very wide, encompassing the details of his trial strategy, drafting of the complaint and his personal thoughts with respect to various aspects of the case, which may not have been disclosed to his client and which spanned a period of years. With the exception of a brief reference to the advisability of settlement (Transcript p. 340), there were no specific communications divulged by Mr. Hochhauser concerning the advisability of accepting the settlement offer or an evaluation of the probabilities of success on the



individual causes of action. The testimony of Robert Cohen is similarly unrevealing as to those issues with the exception of Cohen's acknowledgement that Hochhauser stressed certain provisions of the settlement and the effect of those provisions (Transcript pp. 105, 106). There were no other communications which were testified to which were of the same subject matter as the prior disclosures.

The testimony and exhibits should remain sealed not only because it was in part privileged and in part not privileged (such as the conversation between Hochhauser and Cohen in the presence of the guardian ad litem [Transcript p. 105]), but also because the defendants have failed to show the materiality and necessity of disclosure



(CPLR 3101). Moreover, the defendants have no direct interest in the outcome of this hearing, the issues raised being internal matters concerning the partners alone.

II

Turning now to the merits, it is Mr. Hochhauser's contention that the plaintiff has a personal animosity towards Mr. Reed, and that his personal feelings toward Reed have placed him in a conflict of interest with the other partners. Specifically, it is contended that because of his personal feelings Mr. Cohen has rejected any settlement offers which do not provide for the removal of Reed as Executive Director of the Mid-Island Hospital.

Mr. Cohen, on the other hand, takes the position that his desire to



have Reed removed from a position of control of the hospital is based on his belief in Reed's untrustworthiness and inability to properly administer the Hospital, and a lack of motivation on his part to see that the hospital is managed in a way which will maximize profits to the Simon Cohen Real Estate and Management Company.

None of the class that were given notice appeared or gave any indication of their position on the issues raised.

In its decision directing a hearing the court noted that there is a well recognized potential for abuse and inadequate representation in derivative actions. A representative plaintiff may have a monetary conflict of interest with those he seeks to represent. A



conflict of interest may also exist where the plaintiff is motivated by personal dislike for the defendant (see Norman v. Arcs Equities Corp., 72 F.R.D. 502). In the present case, however, the proof was insufficient at this time to establish that the plaintiff's position in rejecting certain settlement offers was motivated primarily by a personal dislike for Reed, disassociated from the plaintiff's belief that the interests of the Simon Cohen Real Estate and Management Company would be better protected by the removal of Reed from a position of control, or that the plaintiff is unduly influenced by any other motive.

Accordingly, the court finds that the plaintiff is not, at the present time, disqualified from



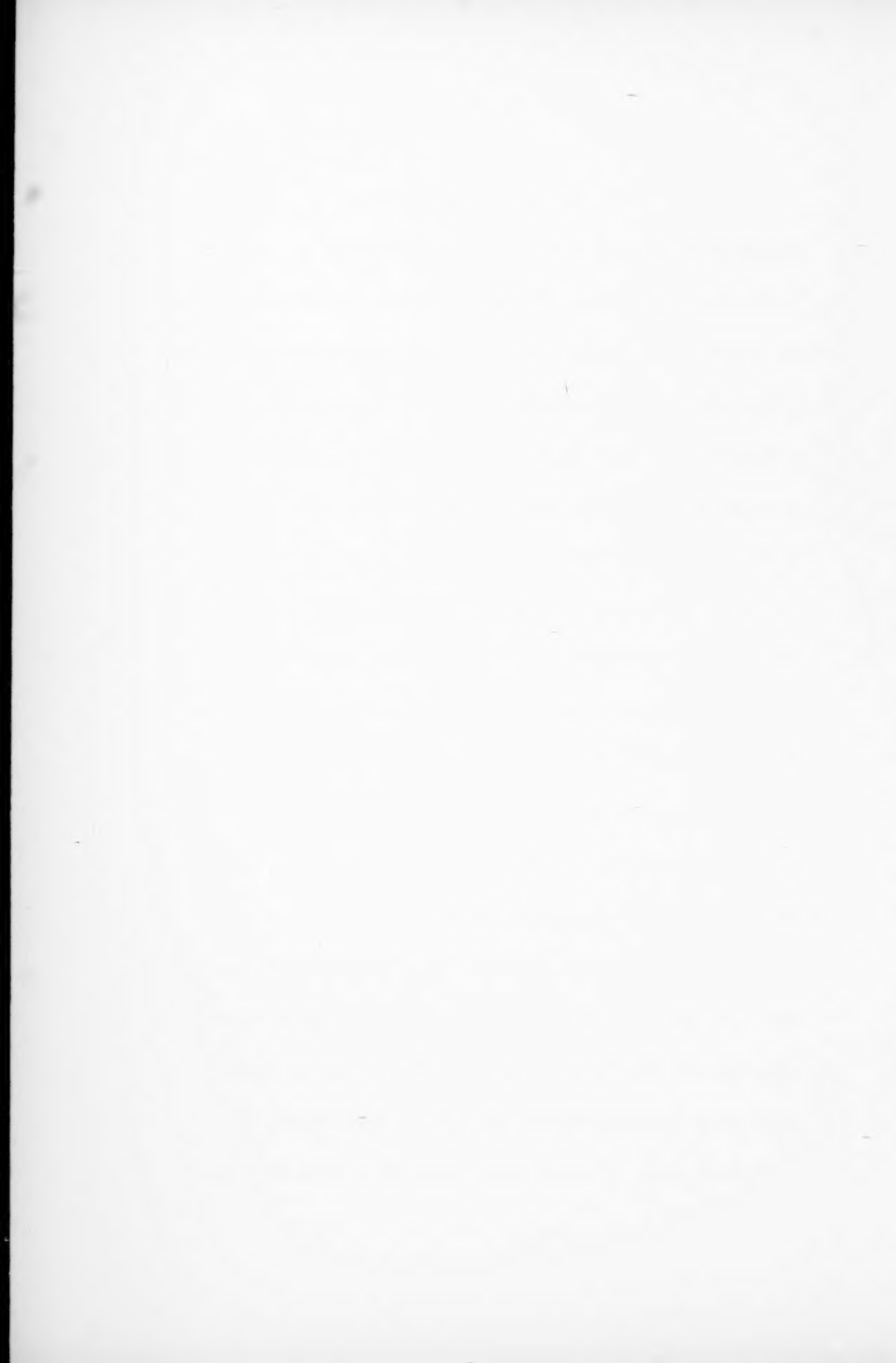
continuing as a representative plaintive in this action. The record will remain sealed as to all of the testimony heard out of the presence of the defendants and as to all items marked for identification in evidence or in evidence which were withheld from disclosure pending this decision.

The motion to substitute an attorney in place of Mr. Hochhauser is granted to the extent that the plaintiff may replace Mr. Hochhauser as attorney for the partnerships. Of course, the plaintiff has always had the right to choose an attorney to represent him on his individual cause of action (seventeenth cause of action) and the motion to substitute attorneys in that aspect of the case is granted as well.



The motion is denied to the extent that the plaintiff seeks a turnover of the files held by the attorneys. The attorneys' retaining lien depends solely on the physical possession of the property and when the property is relinquished the lien is lost. The court cannot direct the release of the files without sufficient security (*Brodsky v. Manello*, 83 AD2d 860; *Eidusen Fuel & Hdwe Co. v. Drew*, 59 AD2d 1025). If the parties can agree on the adequacy of a bond to secure the retaining liens, a turnover of all books and records will be directed.

The question of compensation not only concerns the value of services rendered to the plaintiff individually and any agreements as to compensation between the plaintiff and the attorneys,



but the amounts which may be chargeable against the partnerships for legal services, which will depend upon the recovery, if any. The determination of compensation to the attorneys will be addressed in the court's final decision which will follow the main hearing, or upon approval of any settlement agreements.

The plaintiff's motion for a stay in this court pending a decision in the federal court is denied. The decision to stay a proceeding is within the discretion of the court (CPLR 2201). This court rarely stays its own proceedings and there appears to be no reason to make an exception in this case, particularly since there is lacking a complete identity of the

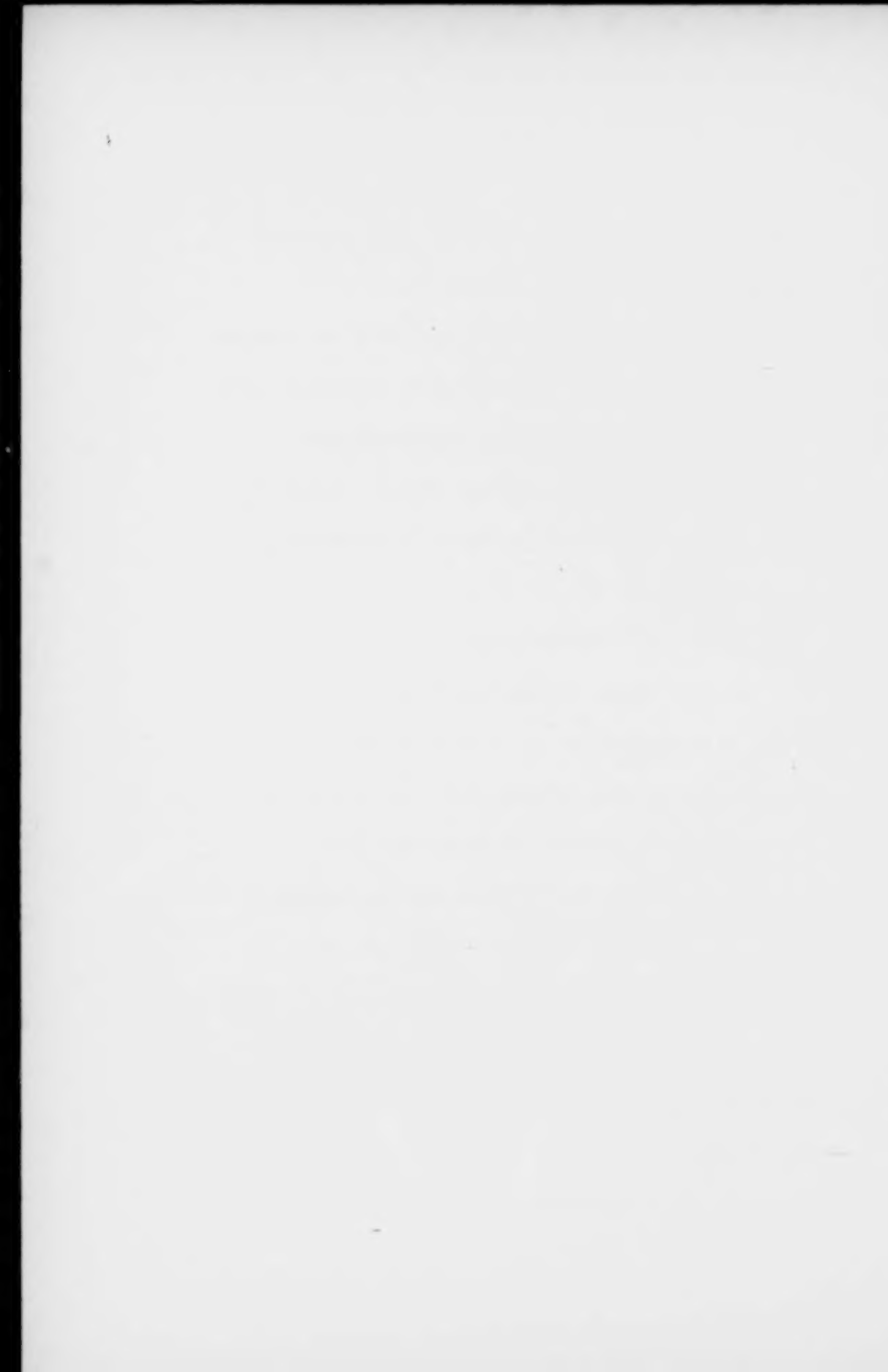


parties, causes of action and relief sought.

The cross-motion for an order providing for an injunction against any federal proceeding or proceedings pending in other courts which concern the issues raised in this proceeding is likewise denied.

Mr. Hochhauser states in his affidavit that he has not been served with a complaint in the subject federal action, nor is there any information regarding pending or prospective litigation in any other state court.

Even if the court were disposed to enjoin a proceeding in the federal court, it would not have the authority to do so. A state court has no power to enjoin a pending in personam action in a federal court (Donovan v.



City of Dallas, 377 U.S. 408), nor restrain the parties as to an action which is prospective (General Atomic Co. v. Felter, 434 U.S. 12; Jamaica Hospital v. Blum, 68 AD2d 1). Mr. Hochhauser must look to the federal court for such relief.

Following the date by which the partners were instructed to respond to the second Notice, the court will determine whether a hearing should be held as to the reasonableness of the defendants' settlement offer or whether the trial should continue. The position, if any, of those partners who have been given notice by the court of the defendants' settlement proposal may have a bearing as to whether the court will conduct a hearing on the settlement offer or proceed with the trial.



Settle order on five days'
notice, with five additional days if
service is made by mail.

Dated: January 18, 1983

C. RAYMOND RADIGAN
Judge of the
Surrogate's Court